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REPORTS OF CASES

DECIDED BY

106

THE SUPREME COURT

OF THE

STATE OF OREGON.

DURING THE

October Term, 1884, March Term, 1885, and part of October Term, 1885.

J. A. STRATTON,
REPORTER.

Volume 12.

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JUSTICES
OF
THE SUPREME COURT

DURING THE TERM OF THESE REPORTS.

JOHN B. WALDO, Chief Justice. Term expires July 4, 1886.
WM. P. LORD, Associate Justice. Term expires July 7, 1888.
W. W. THAYER, Associate Justice. Term expires July 1, 1890.

J. A. STRATTON, Clerk.

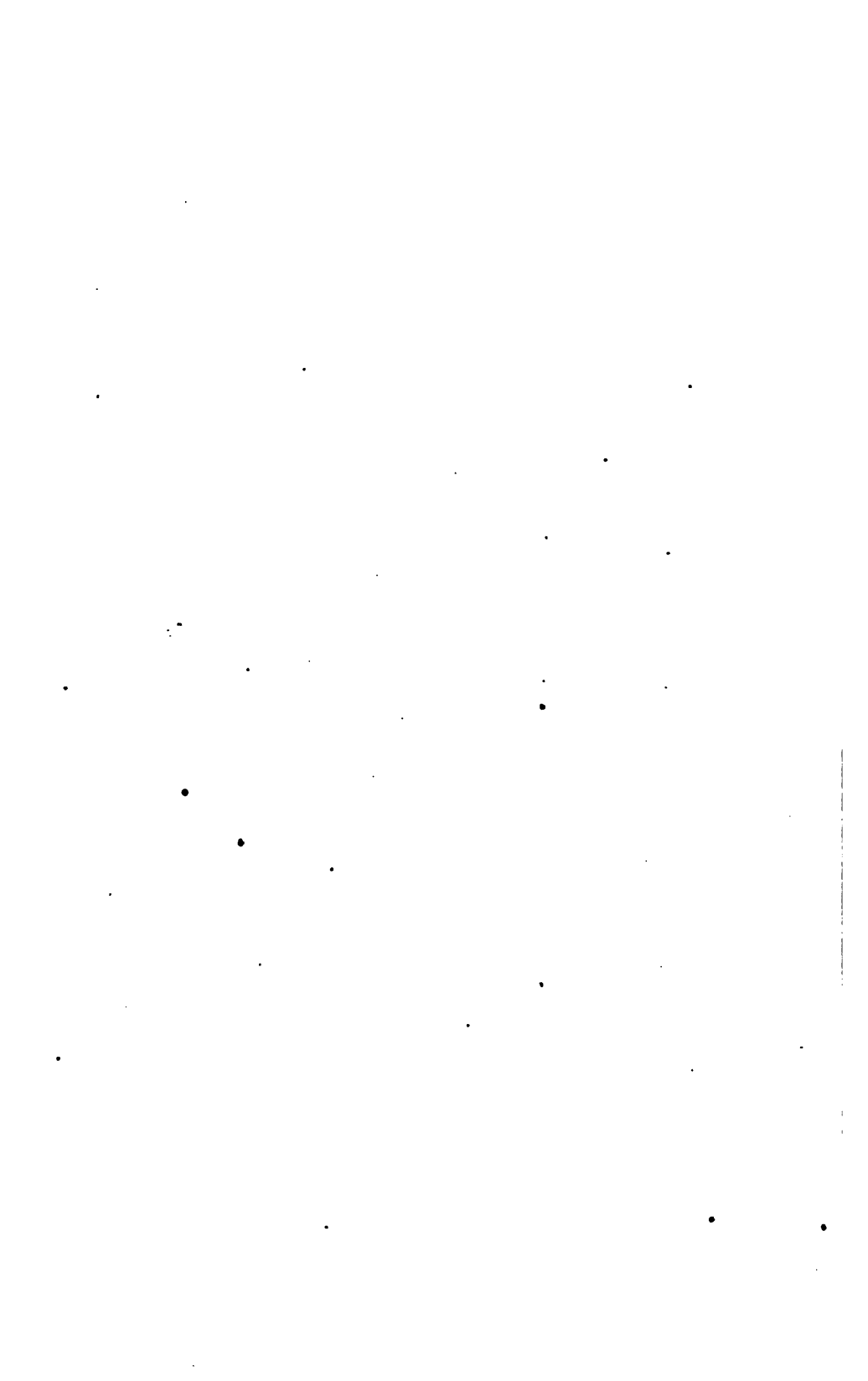


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OCTOBER TERM, 1884.

CASES

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF

OREGON.

OCTOBER TERM, 1884.

[Filed December 22, 1884.]

PERRY BAKER v. GEO. WOODWARD.

DEED—DEFECTIVE ACKNOWLEDGMENT—EQUITABLE TITLE—COVENANT, EFFECT OF.

—Where A, B, and C jointly occupying a tract of land, and claiming to be proprietors thereof, the title to which is in the United States, join in a deed, by which they release, confirm, and quit claim to one of their number, B, a designated part thereof, and such deed contains covenants to warrant and defend against all persons, except the United States, and for further assurance, but was not so attested as to entitle it to record, and afterward A obtained a patent for said tract, *held*, that B or his grantees thereby became the equitable owners of such land, against all persons having knowledge or notice of their rights.

QUIT-CLAIM DEED—PRIOR EQUITIES.—A, after obtaining the patent, conveyed and quit claimed to D “all his right, title, and interest” in said tract. Such deed passed only such an estate as the grantor had a *legal right* to convey by deed of bargain and sale, and D took subject to B’s prior equities in the land.

CONVEYANCE UNRECORDED—JUDGMENT LIEN—PRIORITIES—NOTICE.—A conveyance of real property in this State is void as against the lien of a judgment, unless such conveyance be recorded at the time of docketing such judgment, or within the time after its execution provided by law as between conveyances for the same real property; but such lien would not prevail over a prior unrecorded conveyance, unless it also appeared that the lien was taken or acquired in good faith, without knowledge or notice of such prior unrecorded conveyance.

QUIT-CLAIM DEED—NOTICE.—The fact that a vendor holds only under a deed of quit-claim and release is sufficient notice to a vendee to put him upon inquiry as to the true state of the title.

12	:
11	5
19	4
6*	1
6*	1
23*	8
12	:
24	2
6*	1
33*	0
12	:
27	24
12	:
32	1
12	:
35	361
12	:
139	367
39	410

Argument for Respondent.

REFeree — ORAL EVIDENCE — DOCUMENTS. — A referee to take testimony is appointed only to take oral proofs in the case. Written documents, especially when proved by being authenticated as provided by statute, may be put in evidence at the hearing.

STATUTE OF LIMITATIONS — CONSTRUCTION OF STATUTE — SUITS BETWEEN DONATION CLAIMANTS. — The limitation of five years within which to commence suit in the cases specified in section 378 of the Civil Code, was intended to apply only to controversies arising under section 501 between rival claimants to the same tract as patentees of the State or the United States.

MULTNOMAH COUNTY. Defendant appeals. Affirmed without costs.

Sidney Dell, for Appellant.

The deed from Coffin, Lownsdale, and Chapman to Lownsdale is one of release and quit claim between tenants in common of the possessory rights they then had, and concedes the title not to be in them but in the United States, against which they do not warrant. There being neither a warranty nor an assertion of title, subsequently acquired title does not enure to the grantee. (*Taggart v. Risley*, 4 Oreg. 235; *Dolph v. Barney*, 5 Oreg. 191.) When in a deed of release and quit claim there is a covenant of general warranty, the warranty attaches only to the interest the grantor then had, and does not operate to convey after acquired title. (*Kimball v. Semple*, 25 Cal. 440; *Gee v. Moore*, 14 Cal. 472; *Davenport v. Lamb*, 13 Wall. 419; *Fields v. Squires*, Deady, 366.) This suit falls within the provisions of section 378 of the Code, and the time limited by that section had elapsed prior to March, 1872, and no subsequent legislation could affect the rights of the patentee or his grantees. (*Baldro v. Tolmie*, 1 Oreg. 176; *Holden v. James*, 11 Mass. 396.)

J. C. Moreland, and *P. L. Willis*, for Respondent.

The deed under which respondent claims was construed in *Bohlman v. Coffin*, 4 Oreg. 313, and that decision is conclusive of this case, unless it shall appear that appellant or his grantor was a purchaser in good faith without notice, and for a valuable consideration. A *bona fide* purchaser, to be adjudged such, must aver and

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prove that he paid the purchase money before notice. (*Harris v. Norton*, 16 Barb. 265; *Boone v. Chiles*, 10 Peters, 177; 2 Pom. Eq. § 784; *Woodruff v. Cook*, 2 Edw. Ch. 261; *Everts v. Agnes*, 4 Wis. 343; *Weaver v. Barden*, 49 N. Y. 286; *Duncan v. Johnson*, 13 Ark. 190; *Nolan v. Grant*, 53 Iowa, 392.) A deed which conveys only *all the right, title, and interest* of the grantor in a certain tract means all that the grantor owns in that tract; i. e., all that he may have owned which he has not parted with. (*Adams v. Cuddy*, 13 Pick. 460; *Jamaica Pond Corp. v. Chandler*, 91 Mass. 159; *Oliver v. Piatt*, 3 How. 333; *May v. Le Clair*, 11 Wall. 232; *Dickerson v. Colgrove*, 100 U. S. 578; *Baker v. Humphrey*, 101 U. S. 499.) Since the sale in 1850, neither the appellant nor his grantors have ever had any interest in the property in controversy except as trustee, to hold the naked legal title for the respondent and his grantors. Time does not bar such a trust till it is disavowed. (*Boone v. Chiles*, 10 Peters, 223; *Oliver v. Piatt*, *supra*. And see *Gerdes v. Moody*, 41 Cal. 335; *Bailey v. Carleton*, 2 N. H. 9; S. C. 37 Am. Dec. 190, n.; Angell on Limitations, § 392.) Title cannot be acquired by adverse possession alone in Oregon. (*Goodwin v. Morris*, 9 Oreg. 324.) This suit does not fall within the provisions of section 378 of the Civil Code; that appears to refer only to cases where each contestant derails his right through a patent or claim from the State or United States, distinct from the claim of his adversary.

THAYER, J.—This appeal involves the right to and ownership of lot 4, in block 108, city of Portland. The facts in the case show that Stephen Coffin, Daniel H. Lownsdale, and W. W. Chapman were, on the 25th day of June, 1850, joint occupants of the town site of said city, claiming to be the proprietors thereof, the title to which was in the government of the United States; that at said date the said proprietors united in a deed, by the terms of which the three, in consideration of the sum of \$6,000, released, confirmed, and quit claimed to one of their number, Lownsdale, and to his heirs and assigns, forever, a number of lots and blocks in said town, including said

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block No. 108; that said deed was executed under the hands and seals of the said parties, but was not witnessed or properly acknowledged. The certificate of acknowledgment was signed by a notary public, with a seal attached, and was in due form, except that he did not certify that he knew said parties to be the persons described in and who executed the said deed. The deed contained the usual *habendum* clause, a covenant to warrant and defend the title against the claim of all persons, the United States excepted; and a further provision that if the grantors obtained title from the United States, they would convey the same to the grantee by deed of general warranty.

The said deed appears to have been recorded in the office of the then auditor and recorder of Washington County, August 5, 1854, which county at that time included the present territory of the city of Portland. That on the 11th day of February, 1854, said Lownsdale executed under his hand and seal, and duly acknowledged, a deed, by the terms of which he, in consideration of the sum of \$265, granted, bargained, and sold said lot 4 to Alexander Campbell, with a covenant similar to that contained in the deed to himself, as to further assurance in case he obtained a patent for said land from the United States. Said deed was properly witnessed, and recorded August 5, 1854, in the office of said auditor and recorder. The respondent, by mesne conveyances, afterwards succeeded to the rights of the said Campbell to said lot, the last of which conveyances bears date June 20, 1883. Said Stephen Coffin obtained a patent from the United States, March 2, 1861, to a certain tract of land, including the lot and block in question, and on the 20th day of August, 1870, executed a deed to Charles M. Carter, by the terms of which he, in consideration of the sum of \$7,000, bargained, sold, granted, and conveyed to the said Carter, and to his heirs and assigns, all his right, title, and interest in a tract of land consisting of 323 and a fraction acres, and which included said lot and block, and a large number of other lots and blocks in said city of Portland. Said deed was duly witnessed and acknowledged, and was afterwards, and on the 30th day of September, 1870, recorded in the office of the clerk of

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the county of Multnomah. On the 3d day of April, 1876, Ira F. Powers obtained a judgment in the county court for said county of Multnomah against the said Carter, which, having been docketed, an execution was subsequently issued thereon, and levied upon said lot 4, and under and by virtue of the said execution said lot was sold to Sidney Dell, and a sheriff's deed executed to him in pursuance thereof, on the 8th day of April, 1882. On the 17th day of June, 1882, said Dell executed a deed to the same to the appellant, for an acknowledged consideration, appearing from a recital in said deed to have been \$2,000. On the 21st day of February, 1881, J. H. Lappens, chief of police of the city of Portland, as such chief of police, executed a deed to said lot to the city of Portland. Said deed was duly witnessed, acknowledged, and on the 8th day of March, 1881, duly recorded in the office of the clerk of said county of Multnomah. It was recited in said last-mentioned deed that, by virtue of a warrant duly issued by the auditor and clerk of the city of Portland, dated on the 5th day of January, 1881, commanding the said chief of police to levy upon lot No. 4, in block No. 108, situate, lying, and being in the city of Portland, county of Multnomah, State of Oregon, and to collect an assessment due thereon of \$802.42, for the improvement of Harrison Street, in said city, being the amount assessed against said lot for said improvement of Harrison Street, between Water and Front Streets, in said city, the same being the amount assessed against said lot for said improvements, and remaining unpaid, the said chief of police duly levied upon the said lot No. 4, in block No. 108, and at a public sale of said land, held at the court-house door in the city of Portland, county of Multnomah, and State of Oregon, on the 21st day of February, 1881, in accordance with an advertisement for the sale of said land for unpaid street assessments due thereon, said chief of police on that day sold to the city of Portland, and to its assigns, all of said lot, for the sum of \$863.44, said city of Portland being the highest bidder, and that being the best bid thereon; and that said city had that day paid to the said chief of police said sum of \$863.44 for said lot.

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It further appears that on the 26th day of November, 1881, said city of Portland, in accordance with an ordinance enacted by its common council, executed a deed to said lot 4 to the respondent. It is to be inferred from the evidence that at the time Coffin executed the deed of August 20, 1870, to Carter, Coffin had sold off in lots and blocks a great portion of the tract of land so patented to him. The evidence shows that streets had been laid out and opened across it, and that it had been extensively built upon, and was then occupied by persons claiming to own distinct parcels thereof. Carter himself testifies in his deposition, taken under a commission which issued out of said Circuit Court, that a part was improved and a part not; and when interrogated as to whether Harrison Street school building, Smith Bros.' foundry, Smith Bros. & Co.'s saw mill, John Honeyman & Co.'s foundry, No. 1 stables, St. Mary's academy, water company's reservoir, No. 5 engine house, the Portland Mechanic's Fair building, were not upon the lands described in that deed, answered, in substance, that they were there, excepting the Harrison Street school building and the Mechanic's Fair building; and he further stated that the sale, referring to the said deed of August 20th, included in the Coffin tract whatever lots and blocks Coffin owned in that tract at that time. He also stated that the consideration mentioned in said deed from Coffin to him was on account of liabilities of Coffin which he assumed, amounting to about the sum mentioned as the consideration in said deed, and that he (Carter) received in payment thereof the said deed, and railroad lands in the counties of Washington and Yamhill, and a farm on Sauvie's Island. In answer to another interrogatory annexed to said commission, as to whether he purchased said real estate, including said lot, in good faith, he replied that he did; that he purchased it as he did the other property, in good faith; that he had no actual knowledge of Lownsdale's claim to parts of the Coffin tract until after his purchase; that he was aware of a rumor that Lownsdale laid claim to certain lots and blocks, but nothing definite.

It also appears in evidence that Carter had been the owner

of considerable real property in the city of Portland, and had dealt quite extensively in real estate in said city. No deed appears to have ever been made by Coffin to Lownsdale, in accordance with the covenant in said deed of June 25, 1850, that in case title was obtained from the United States, etc., he would convey by deed of general warranty, etc., though said Coffin did, on the 24th day of January, 1882, execute a deed to the respondent, by the terms of which he, in consideration of ten dollars, released and quit claimed to respondent the said lot 4; said deed was duly acknowledged, and on the 31st day of January, 1882, recorded in the office of the clerk of the county of Multnomah. It also appears in evidence that said lot 4 remained vacant and unoccupied until December, 1882, when the respondent went into actual possession thereof, and is still in possession of the same. It appears from the pleadings that some time in 1882 the appellant commenced in the said Circuit Court an action at law against the respondent to recover the possession of said lot, claiming to be the owner thereof in fee. This suit was commenced by the respondent against the appellant to restrain his said proceedings at law, claiming that he was the equitable owner of said lot as against the appellant, and everyone through whom he derived his legal title.

The main points presented by the case are: (1) The nature and effect of the deed of June 25, 1850, from Coffin, Lownsdale, and Chapman to Lownsdale; (2) of the deed of August 20, 1870, from Coffin to Carter; (3) the effect of the judgment in favor of Powers and against Carter; (4) the rights of the appellant acquired from Dell; and (5) the effect of the amendment of section 378 of the Civil Code, approved October 22, 1870, which provides that suits to set aside, cancel, annul, or otherwise affect a patent to lands issued by the United States, etc., shall be commenced within five years, etc.

The first point has been determined by this court. In *Bohlman v. Coffin*, 4 Oreg. 313, the validity and effect of the deed of June 25, 1850, was directly passed upon. In that case Bohlman claimed certain premises included therein under mesne conveyances from Lownsdale. The court there held that said deed

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was good and valid, and that Coffin was bound by the covenant to make a deed of general warranty. The court used the following language:—

“The first question of importance is as to whether Coffin was bound by the covenant in the deed to Lownsdale of June 25, 1850. That was a good and valid deed as between Chapman and Coffin, grantors, and Lownsdale as grantee, and we are of the opinion that Coffin is bound by the covenants of further assurance therein contained, and that it was his duty to have executed to the assignees of Lownsdale, under the deed, a deed of general warranty after he obtained his patent from the general government.” (*Bohlman v. Coffin*, 4 Oreg. 315.)

At page 318 the court said:—

“It follows that Carter stands in the same position as his grantor. He has the legal estate, but he holds it as the trustee of Bohlman, who is the equitable owner.”

There was this difference in the facts of the two cases: Bohlman, and those under whom he claimed from Lownsdale, had been continuously in possession of the premises in controversy, which fact, of course, was held to be notice to Carter when he obtained the deed from Coffin; but from the view we take of the case, that circumstance is not material.

This brings us to the second point. The deed to Carter from Coffin was of the right, title, and interest of the latter to the former in the said tract of land. That only extended to the right, title, and interest remaining in Coffin after the conveyance of the equitable estate in the lot and block to Lownsdale. Section 8, chapter 6, Misc. Laws of Oregon, provides that “a deed of quit claim and release, of the form in common use, shall be sufficient to pass all the estate which the grantor could *lawfully convey* by a deed of bargain and sale.” This provision is the same as one in the Minnesota statute, and which has been construed by the courts of that State to mean that such a deed shall be sufficient to pass all the estate which the grantor had legal right to convey by deed of bargain and sale (*Martin v. Brown*, 4 Minn. 292, Gil. 209; approved in *Marshall v. Roberts*, 18 Minn. 408, Gil. 366); which means

that the grantor can, by such kind of deed, convey the residuum of the estate he has and no more, and the grantee necessarily understands that he is, in such case, simply acquiring the estate of the grantor, subject to his prior conveyance of any estate or right in the premises. The same rule also exists independently of any statute. (*May v. Le Claire*, 11 Wall. 232.)

In this view of the case, Carter acquired nothing in the tract of land by virtue of the deed of August 20, 1870, beyond the bare legal title which Coffin was then holding in trust for the use and benefit of Lownsdale and his grantees. He had no legal right to convey more than that, and his quit-claim deed and release confines his conveyance to that alone. Carter evidently understood that he was only buying Coffin's interest in the property described in said deed; as he says in the deposition referred to, that "the sale included in the Coffin tract whatever lots and blocks Coffin owned in that tract at that time." Coffin did not at that time own block 108, except as before mentioned. The equitable title thereto had been conveyed away, and it never passed to Carter, nor had he any right to expect otherwise. A release at common law of any interest in lands was made to the person who had the possession thereof, or some interest therein. It is defined in Sheppard's Touchstone: "The conveyance of a man's right, which he hath unto a thing, to another that hath the possession thereof, or some estate therein" (ch. 19, p. 320); and it was contrary to the nature of a release to give possession. One tenant in common could not release to his companion, because they had distinct freeholds. When a man had the right and possession in him he was compelled to convey by feoffment. He could give a release only when out of possession, and it could then only be made to the one in possession. It was the conveyance of a right to a person in possession. (Ch. 19. p. 320, n. 1.)

Said section 3 of the Miscellaneous Laws of Oregon, before referred to, has changed the common law upon that subject so far that a person may release the right to an estate or interest therein to one out of possession, or who has no interest in the estate; but such person, by that form of conveyance, can only

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release the interest he has therein the same as at common law. Nor is it any more effectual now to cut off outstanding equities than formerly. The releasee only bargains for the interest of the releasor, and has no right to claim anything beyond that. It would, however, require an immense amount of credulity, in view of the facts and evidence in this case, to believe that Carter was a purchaser in good faith of the lot in question under the deed from Coffin of August 20, 1870, without notice of the deed of June 25, 1850. He did not know the fact that the deed last referred to had been made, in the sense one would know such a fact from being present when it occurred; but we are inclined to believe that "the rumor" that he was aware of, "that Lownsdale laid claim to certain lots and blocks," could not have been as vague as might be inferred from his testimony. Too many valuable lots and blocks were affected by that deed to permit the fact of its execution to pass unnoticed by residents and land-owners of the city of Portland; nor would his testimony, or the allegations in the answer as to that matter, authorize us in finding that he was such purchaser; but we prefer to place our decision of that point upon the legal effect of the deed he received from Coffin, as before indicated.

The third point—the effect of the judgment recovered against Carter by Powers—is more difficult to determine. The rule formerly was, in most of the States, that a prior unrecorded mortgage or an outstanding equity was superior to a subsequent docketed judgment. It was established as a part of the equity jurisprudence, and based upon the principle that equitable interests *in rem*, including equitable liens upon specific parcels of land, had priority over a general statutory lien of a subsequent docketed judgment. It was the general rule of equity that the judgment lien only extended to the actual interest of the judgment debtor, and was subject to all existing equities which were valid as against such debtors; but section 268 of the Civil Code of this State has materially interfered with that doctrine by providing that a conveyance of real property, or any portion thereof or interest therein, shall be void, as against the lien of a judgment, unless such conveyance be recorded at the

time of docketing such judgment, or recorded within the time after its execution provided by law, as between conveyances for the same real property. This section of the Code was enacted by the legislative assembly of the State, October 11, 1862.

This court, in *Stannis v. Nicholson*, 2 Oreg. 332, held that a judgment becomes a lien upon real estate from the time of its docketing, subject to the known equitable rights of others in the premises; and in *U. S. v. Griswold*, 7 Sawy. 332, the Circuit Court of the United States for the district of Oregon intimates that such lien would not prevail over an unrecorded conveyance by virtue of said section 268, unless it also appeared that the lien was taken or acquired in good faith, without knowledge or notice of such prior unrecorded conveyance. The reason assigned by the court for the view suggested was the fact that the conveyance of a subsequent purchaser, though first recorded, is not allowed by an analogous section of the statute to prevail over that of a prior purchaser, unless obtained in good faith. The same view is maintained in *Lamberton v. Merchants' Nat. Bank of Winona*, 24 Minn. 281, in reference to a similar provision of the statutes of that State, and the same reason given therefor. The construction given to the provision of the statute under consideration by the authorities referred to is not in accordance with its literal reading, yet it is entirely consistent with the reason and spirit of the statute, and we feel constrained to adopt it in this case. But it is contended by the appellant's counsel that Powers took and acquired his lien in good faith, and without notice of the outstanding deed of June 25, 1850, executed to Lownsdale. As a matter of fact, Powers may never have had actual knowledge of the existence of that deed. He is chargeable, however, with notice of the kind of deed under which Carter claimed the premises. That instrument constitutes a part of his chain of title. The lot in question was unoccupied, and if he believed, when his judgment against Carter was entered, that the latter was the owner of it, he must have so concluded from an inspection of the deed, or of the record thereof. He occupied the same position as would a purchaser of Carter's interest in the property, and had con-

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structive notice of every matter appearing upon the face of the deed under which he claimed to have acquired his lien upon it. (Pom. Eq. Juris. § 624.) Powers could not have supposed that he was obtaining a lien by virtue of the docketing of his judgment upon said lot 4, beyond the interest Coffin had in it on said 20th day of August, 1870, which was the interest therein that Coffin then had "the legal right to convey."

It would be absurd to claim that Powers, by virtue of his judgment against Carter, acquired a lien on something Carter never owned, nor could have been presumed to have acquired under the deed executed to him by Coffin. The judgment was a lien upon the real property of Carter (§ 266, Civ. Code), and by force of said section 268, upon any property he might have conveyed away, in case the deed of conveyance had not been recorded as provided by said latter section. It would be unreasonable, in my opinion, to hold that said section 268 intended that a judgment creditor, by the docketing of his judgment, would secure a lien upon any other real property than that which the title deeds of the judgment debtor showed him to be the owner of, unless it were shown that he had succeeded to it in some other manner. If the deed to Carter had purported to convey to him the property in question, the case would have stood differently. Then it would have been a case in which a grantor had conveyed the same property twice, and the judgment having been recovered without knowledge to the judgment creditor of the prior conveyance, his lien might attach to the entire property. But it must be borne in mind that Coffin did not convey the same property twice. He first conveyed the substance of the estate to Lownsdale; afterwards the residue, which was the nominal legal title, to Carter. (*Adams v. Cuddy*, 13 Pick. 463.) The case stands upon the same footing as where A, being the owner of an estate, conveys an undivided half interest in it to B, and then quit claims his interest in it to C. The latter obtains thereby only the remaining half interest, and in case B should obtain a judgment against C, it would only bind such interest, although B's deed were not put upon record. It would not be a lien upon B's

interest, for the reason that the deed to C did not purport to convey any other or greater interest in the estate than A had. The section of the statute (§ 268) is a statute to prevent frauds. (*Fash v. Ravesies*, 32 Ala. 454.) It is evidently intended that a judgment, when docketed, should be a lien upon all the property of the judgment debtor shown by the records to belong to him, notwithstanding he had conveyed away the same, or a portion thereof, or an interest therein, by a conveyance not recorded at the time of the docketing of the judgment, and not within the time after its execution provided by law.

The fact that Carter was only holding under a deed of quit claim and release from Coffin was sufficient notice to Powers to put him upon inquiry as to the true state of the title; and by parity of reasoning, the rule in such case should be the same as in the case of a purchaser who has knowledge of a fact sufficient to put him upon inquiry as to the existence of some right or title in conflict with that he is about to purchase; in which case he is presumed either to have made the inquiry and ascertained the extent of such prior right, or to have been guilty of a degree of negligence equally fatal to his claim to be considered a *bona fide* purchaser. (*Williamson v. Brown*, 15 N. Y. 354.) The rule under the equity practice was that a purchaser, claiming to have been such in good faith, must, in his answer or plea, show how the grantor acquired title, and that the title purchased must be apparently perfect, good at law, a vested estate in fee simple. (2 Lead. Cas. Eq. 100, 4th Am. from 4th London ed.) Also, that the plea must aver, if the conveyance pleaded were an estate in possession, that the vendee was seized or pretended to be seized at the time he executed the conveyance, and that he was in possession thereof. (Daniell Ch. Pl. & Pr. 4th Am. ed. 671, 672.) This we may imply was required, because a party would not be a purchaser in good faith if the facts were otherwise.

When the judgment against Carter was entered he was not seized or possessed of the lot in suit, nor did he have any apparently perfect title thereto. Besides, there is a difference between the lien of a judgment upon real property and a pur-

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chase of it in favor of the latter and against the former in this: A purchase may be of the absolute title to the property. The purchaser could refuse to buy an estate except upon the terms that he obtain complete ownership of it, while the judgment creditor only secures a lien upon the interest his debtor has in it, benefited, of course, by the provision of said section 268. If the judgment debtor have but an estate for life in the property, the lien of the judgment only attaches to that. The judgment creditor has no right to expect anything beyond that; but a purchaser may bargain for a perfect title, and expect, when he receives the conveyance, that he is obtaining such title. The claim of the latter to protection in such cases would, therefore, be stronger than in case of the former. Equity would require of a judgment creditor a more thorough examination into the condition of the debtor's title than it would of a purchaser, where the question of good faith is involved. When Powers ascertained that Carter was holding under a deed of Coffin's interest to a large tract of land, a great portion of which had been disposed of by him at the time of its execution, he should have made some effort to learn the status of the title to said lot 4. That deed informed him, in substance, as stated by Chief Justice Shaw, in *Adams v. Cuddy*, *supra*, that Coffin had conveyed to Carter all the right and title he "had not legally parted with," and before he can claim to have taken the said judgment in good faith, he should have endeavored to find out whether Coffin had not parted with the title to said lot, or in some manner affected it. The evidence, however, does not show that he made any attempt in that direction. The deed of June 25, 1850, had been recorded in the book of deeds of the county, and it imparted just as much notice, in fact, as though it had been properly acknowledged. There were no witnesses to its execution, but the law at that time required none. By the curative statute, approved October 20, 1876 (Sess. Laws 1876, p. 27), the defect in its acknowledgment was corrected, and by a like statute, approved October 19, 1878 (Sess. Laws 1878, pp. 82, 83), the record of such a deed, duly certified, was made evidence in the courts. These legislative acts may not

have operated retrospectively, but they enabled a party to prove such deeds by an authenticated copy from the record thereof.

The decision in *Bohman v. Coffin*, *supra*, was announced in 1873, and it hardly seems possible that anyone living in Portland, under all the circumstances, could, on the 3d day of April, 1876, the time Powers' judgment was entered, have been ignorant of the fact that the deed of June 25, 1850, had been executed. At all events, it is not shown that Powers made any effort to ascertain it, which in *Williamson v. Brown*, *supra*, was held to be a degree of negligence fatal to his claim of having been a *bona fide* judgment creditor; and we are not inclined to regard him such, or to hold that the lien created by said judgment attached to any interest in the property beyond that conveyed to Carter.

It was claimed upon the argument by the appellant's counsel that the deed from Coffin to Carter of August 20, 1870, should not be considered as a part of the evidence of the suit, for the reason that it was not proved before the referee appointed to take the testimony. A referee in such cases is only appointed to take the oral proofs in the case. Written documents, especially when proved by being authenticated as provided by statute, may be put in evidence at the hearing. Under the practice in equity it was common to call witnesses at the hearing to prove the execution of an instrument in writing, and when thus proved to give it in evidence, and our Code has not changed the rule. The term "testimony," as used in the Code, must be taken in accordance with its ordinary meaning, which is the statement made by a witness under oath. The respondent, therefore, had a right to introduce a certified copy of said deed at the hearing of the case in the Circuit Court.

The fourth point—the rights of the appellant acquired from Dell—is already determined in part in the determination of the effect of the judgment in favor of Powers. If the lien of that judgment had been entitled to preference over the deed of June 25, 1850, then Dell, as purchaser at the execution sale under the judgment, would have been also entitled to preference

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over it, although he had been knowing to the fact of the existence and validity of the deed; and the appellant, as purchaser from him, would necessarily have succeeded to the same right of priority. But, as the case stands, such preference cannot be given unless it has been shown that Dell, or the appellant, were purchasers of the lot in good faith, and for a valuable consideration, which consideration must be proved to have been paid independently of any recital in the deeds executed to them, and without notice of the existence of said deed at the time of its payment. The authorities upon this subject are so numerous and uniform that it is unnecessary to cite any of them, and we deem it sufficient to say that the proofs in the case do not show any such payment of consideration or want of notice.

The fifth point involved a construction of the amendment to section 378 of the Civil Code, approved October 22, 1870. The amendment reads:—

“But no suit shall be maintained to set aside, cancel, annul, or otherwise affect a patent to lands issued by the United States or this State; or to compel any person claiming or holding under such patent to convey the lands described therein, or any portion of them, to the plaintiff in such suit; or to hold the same in trust for or to the use and benefit of such plaintiff, for or on account of any matter, thing, or transaction which was had, done, suffered, or transpired prior to the date of such patent, unless suit is commenced within five years from the date of such patent, or within one year from the passage of this act.”

When this provision was enacted there was a general limitation law in the State providing certain specified periods in which actions and suits were required to be commenced. This special limitation was evidently intended to apply to a particular class of cases at the time of its enactment. Section 501 of the Civil Code was in force, which provided, in effect, that whenever any person claimed any real property as donee of the United States by virtue of the settlement under the donation law, and the patent therefor had been wrongfully issued to another, such person might maintain a suit in equity against

the patentee for the purpose of having such patent canceled, and the estate or interest of the plaintiff in the property ascertained and established; and that if it appeared in such suit that the plaintiff had made the settlement under the law, and had complied with its terms, he should be deemed to have a legal estate in fee in the property, although the patent had issued to another; but there was no period of limitations provided, either in said section or in the general limitation law of the State in which such suit should be commenced, and we may infer that said amendment was intended by the legislative assembly to apply to cases arising under said section 501. It was that section which allowed a suit to be maintained to cancel a patent, and the fact that the time for its commencement was not limited, and that the provision of limitation was a special one, show that the five years' limitation in which to commence the suit referred to in said amendment was intended as a limitation of the time in which suits must be commenced to enforce rights which section 501 provides for the enforcement of. The language of the amendment does not directly apply it to the section. The latter authorizes the maintenance of a suit to cancel a patent, establish the estate or interest of the plaintiff in the property, and provides that he shall be taken and deemed to have a legal estate in fee therein; while the former inhibits the maintenance of a suit to set aside, cancel, annul, or otherwise affect a patent, or to compel the patentee to convey to the plaintiff, or to hold in trust for his own benefit, unless the suit be commenced within five years. The difference, thus far, between the two provisions is more in verbiage than in substance. Additional terms, presenting different phases in which the remedy might be attempted to be applied, were inserted in the amendment, doubtless as a matter of prudence.

Again, the section specifies the grounds upon which the suit may be brought, viz., when the plaintiff has made a settlement under the donation law and complied with its conditions, and the patent has wrongfully issued to another. The draughtsman of the amendment evidently intended not only to cover the case mentioned in the section, but every other conceivable case

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of the kind that might arise, and hence uses the general language, "for or on account of any matter, thing, or transaction which was had, done, suffered, or transpired prior to the date of such patent"; but it all refers back, and is made applicable to the setting aside, canceling, nullifying, and affecting a patent. The matter, thing, transaction, etc., set out in the amendment were intended to be such as were calculated to affect the end; that would tend to establish that the patent had issued to the wrong person, and that the plaintiff in the suit, by prior settlement and compliance with the conditions of the donation law, had entitled himself to the patent. Hence, it was only in cases where there was a conflict between rival claimants to the donation from the government of the United States, or of a grant from this State, that the limitation specified in said amendment was intended to apply. The case under consideration does not fall within that class of cases, and consequently the said five years' limitation has no application to it whatever; and, as said by the counsel for the respondent, its application to cases of the latter character—cases where the donee had obligated himself by contract, prior to the passage of the donation law, to do or perform some act when he acquired title to the property—would lead to the greatest absurdity.

Prior contracts were upheld by the donation act, and it is known to the court as a part of the history of the country that donees under it had, in many instances, contracted away a large portion of their claims before it went into effect; but that class of contracts created no competition as to whom the patent from the general government should issue to and were unaffected by the said amendment to said section 378. None of the other provisions of the Statute of Limitations in this State are applicable to the case, though the appellant's counsel claims that Coffin had constructive possession of the premises by virtue of the patent from the United States, which was transmitted to Carter by the deed of August 20, 1870, and was succeeded to by appellant, and that the respondent, and those under whom he claims, not having been seized or possessed of the premises for the period between the date of the issuance of the patent until December,

1882, were barred of all claim or interest therein; but we are unable to agree with the counsel that Coffin had constructive possession of the premises after he executed the deed of June 25, 1850. By that deed he had released, confirmed, and quit claimed unto Lownsdale, his heirs and assigns, forever, the property, and covenanted to warrant and defend it against the claim of all persons, the United States excepted, and in case he obtained title from the United States that he would convey the same (the title) to Lownsdale by deed of general warranty. He was in possession of the property at the time said deed was executed, and the effect of that deed transferred the possession, and he certainly did not become re-invested of it by force of the patent. The donation act recognized the legitimacy of such occupancy, and granted title to the settler when qualified under the law, and the patent confirmed it. Possession followed the settlement, and would have remained in Coffin had he not parted with it. Coffin could not rightfully claim, after the execution of said deed of June 25, 1850, to have had possession in law of the premises therein described, in the face of that instrument. The deed operated upon the possession as an alienation of it, and estopped Coffin from rightfully reclaiming it.

As to the matter of the legality of the tax sale for the street improvement, we have concluded not to express any opinion. It was entirely irrelevant to the case, and should have been stricken out of the complaint. The appellant's counsel suggested on the argument that the court ought to look into the question, and if it found that the equities arising out of the other branch of the case were with the respondent, and that the tax sale was legal, reverse the decree of the Circuit Court, upon the ground that the respondent had an adequate remedy at law. If appellant had not answered, and the case had come here upon demurrer upon that ground, this court would have been inclined to sustain it; but by answering the complaint the appellant has submitted to the jurisdiction of the court, and it would not, under the circumstances, feel warranted in dismissing the suit. Besides, the decision only involves a question

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of costs, which this court has power to regulate and direct payment of as the equitable circumstances require.

A decree will therefore be entered in favor of the respondent and against the appellant for the relief demanded in the complaint; that neither party recover costs upon appeal or in the Circuit Court; and that the respondent be directed to pay the entire disbursements of both courts that are properly taxable as such, when duly taxed; and that the decree appealed from in other respects be affirmed.

[NOTE. — LORD, J., stated orally that he concurred in what was said of the possession of the respondent. He had constructive possession of the property in controversy by virtue of his deed, and it was this possession which barred the right of the appellant under section 378 of the Code. The position of the appellant is that neither the respondent nor his grantors ever held such possession as would limit the right of the former to commence suit under section 378, or to plead it as a defense. This position was untenable.

With him concurred WALDO, C. J.—REF.]

[Filed January 5, 1885.]

QUIGLEY v. McKEE.

SLANDER—TIME.—In an action of slander it is not necessary to prove that the slanderous words were spoken on the day alleged in the complaint. It is sufficient to prove that they were spoken at any time before the commencement of the action, and are not barred by the Statute of Limitations.

ID.—ACTIONABLE WORDS.—When the court can see, without the aid of a jury, that the actionable words must prove injurious, they will be actionable *per se*; and the plaintiff in such case will be entitled to at least nominal damages.

MULTNOMAH COUNTY. Plaintiff appeals. Reversed.

Slander for an alleged false and malicious utterance and publication concerning appellant of the words "she is a thief." The words were alleged in the complaint to have been spoken on the 5th day of July, 1883, and the court refused to permit evidence to be given that they were spoken at any time other than as alleged. This is alleged as error.

A. Lenhart, for Appellant.

James Gleason, for Respondent.

WALDO, C. J.—This is an action of slander, for calling the plaintiff a thief. The obvious import of this language was to impute to the plaintiff the felonious taking of property, or larceny (*Dunnell v. Fiske*, 11 Met. 554), and the words are actionable though the defendant meant but to impute petit larceny; for “to accuse one of petit larceny will bear action, and for that the offender shall be whipped.” (*Whitacre v. Hillidell*, Aleyn, 11.) This is still good law, though the offender be no longer whipped. The material element which lies at the foundation of the action of slander is social disgrace, or damages to character in the opinion of other men. (*Sheffill v. Van Deusen*, 13 Gray, 304, 1 Am. Lead. Cas. 5th ed. 113.) The observations in *Harrison v. Thornborough*, Gilb. Cas. 117, rest on this principle: “Parker, C. J.,” runs the report, “remembered a saying of Treby, C. J., that people should not be discouraged that put their trust in the law; for if men could not have a remedy at law for such slanders, they would be apt to carve it for themselves, which would let in all the ill consequences of private revenge.” (*Naben v. Miccock*, Skin. 183.) Now, “if people would gratify the passion of revenge outside of the law, if the law did not help them, the law has no choice but to satisfy the craving itself, and thus avoid the greater evil of private retribution.” (Holmes Com. Law, 41, 42.)

In *Krebs v. Oliver*, 12 Gray, 239, it was held actionable to impute a crime, although the party had, as alleged, suffered the penalty of the law, or was no longer exposed to the danger of punishment. Bigelow, J., cited, with other cases, *Boston v. Tatam*, Cro. Jac. 623, where it was said: “And it is a great slander to be once a thief, for although a pardon may discharge him of the punishment, yet the scandal of the offense remains; for *pæna potest redimi; culpa perennis erit.*” In *Jones v. Herne*, 2 Wils. 87, Willes, C. J., said that if it were now *res integra*, he should hold calling a man a rogue or a woman a whore, in public company, were actionable. But if this were so, it should seem, according to the formative principles of the common law, that all other words uttered in public company that “sound in great discredit of the plaintiff,” or cast a stain on his character,

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should in like manner be actionable. A practical standard must be fixed, and a limit necessarily arbitrary be put, somewhere to these actions, else there were cause for the fears of Chief Justice Vaughn in *King v. Lake*, 2 Vent. 28, that "the growth of these actions would spoil all communications."

The rule in Massachusetts seems to be that words generally are actionable in themselves when they impute an offense to which the law attaches a disgraceful or infamous punishment, or impute a punishable offense of a disgraceful or infamous character. (*Miller v. Parish*, 8 Pick. 384; *Brown v. Nickerson*, 5 Gray, 1; *Kenney v. McLaughlin*, 5 Gray, 5; *Krebs v. Oliver*, 12 Gray, 239; *Buckley v. O'Neil*, 113 Mass. 193; *Pollard v. Lyon*, 91 U. S. 232, 233; *Onslow v. Horne*, 3 Wils. 177; 1 Am. Lead. Cas. 98.)

It is said that malice is an essential ingredient in slander. There is a singular and practical illustration of this principle in *Brook v. Montague*, Cro. Jac. 91, where Coke, arguing at the bar, cited a case where a parson in a sermon "recited a story out of Fox's Martyrology, that one Greenwood, being a persecuted person and a great persecutor, had great plagues inflicted upon him, and was killed by the hand of God, whereas, in truth, he never was so plagued, and was himself present at that sermon." Greenwood thereupon brought an action against the parson, "but Wray, C. J., delivered the law to the jury that it being but as a story, and not with any malice or intention to slander any, he was not guilty of the words maliciously, and so was found not guilty." It is doubtful if malice would now be taken so literally to be the gist of the slander. (Add. Torts, §§ 40, 1090; Holmes Com. Law, 138; 16 Am. Law Rev. 318.)

When we come to slander affecting a man in his employment or trade, the ground of the action is different. Here, injury to livelihood, through the instrumentality of injury to character, is the sole object to which the attention of the law is directed. "The law is very tender of people's employments and professions." (*Gyles v. Bishop*, 1 Freem. 279.) Where the court can see without the aid of a jury that the slanderous words must prove injurious, they will be actionable within

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themselves. The plaintiff in such case will be entitled at least to nominal damages. (*Webb v. Portland Manuf. Co.* 3 Sum. 192.)

It is not necessary to prove that the slanderous words were spoken on the day laid in the complaint. It is sufficient to prove that they were spoken before the commencement of the action, and are not barred by the Statute of Limitations. (*Potter v. Thompson*, 22 Barb. 87.)

Judgment reversed.

[Filed February 13, 1885.]

HACKETT AND THE MULTNOMAH RY. CO. v. WILSON & MONTGOMERY.

JURISDICTION TO LICENSE FERRIES—TOLLS.—The primary object of our statute, conferring jurisdiction upon county courts to license ferries, is to secure the public accommodation; the right to take tolls is conferred as an equivalent for the obligation to accommodate the traveling public. Although the right to take tolls is *privati juris* and incident to the franchise, a ferry is *publici juris* and cannot be created without a license.

FERRIES PART OF HIGHWAY—RIGHTS OF PUBLIC.—A ferry forms part of, and can only exist in connection with a public highway, or as a connecting link between places in which the public has rights, on paying the tolls prescribed by public authority.

COUNTY COURTS—EXTENT OF JURISDICTION.—When the county court has exercised its authority by granting a license at the suggestion of the public convenience, and a ferry is established connecting such highway or places, it has exhausted its jurisdiction as to such highways or places while such franchise exists, and cannot license another ferry at substantially the same place.

ASSIGNMENT OF LICENSE—CANNOT BE QUESTIONED COLLATERALLY.—Whether a ferry license is assignable or not, *quære*; but if it is a personal trust, not assignable without the consent of the granting power, the right to object to its transfer, or its exercise by a party other than the original licensee, is a right affecting the public, to be taken advantage of by its officers, and cannot be collaterally questioned.

MULTNOMAH COUNTY. Both parties appeal. Judgment modified.

On the 4th day of December, 1882, R. B. Wilson and J. B. Montgomery filed their petition with proof of notice in the county court of Multnomah County, for a ferry license between

12 25
13 127
6* 632
6* 660

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Portland and Albina, across the Willamette River, alleging, amongst other reasons, that the present facilities for crossing said river at or anywhere near said points are limited and of small capacity, and particularly insufficient in respect to the landings on both shores. That said landings are steep, and so poorly arranged that any kind of loaded teams have great difficulty in passing over them. That the petitioners being respectively the owners of the lands and landing places of the proposed ferry, and of lands adjoining, are in condition, and are desirous of constructing permanent and commodious landings, easy of approach and suitable to accommodate all traffic.

On the 6th day of December, the Multnomah Railway Company, M. A. and Nathan Hackett, filed their remonstrance to the Montgomery petition, setting forth that they are the owners of the Albina Ferry, and alleging that the Montgomery petition prays for a ferry license between the points for which the license of the Albina Ferry is issued, and alleging further, that the Albina Ferry license was issued at the October term of the county court, 1880, for five years to M. A. Hackett and Norman Finch. That it was granted upon the petition, among others, of R. B. Wilson, J. B. Montgomery, and William Reid, and that in addition to such petition said Montgomery, Reed, and Wilson accepted in writing service of the notices required by law to be served upon the shore-owners; that said ferry had been established and maintained up to the present time.

That in November, 1882, Messrs. Hackett, Foster, and Moore, being the owners of said ferry, a two thirds interest was purchased by the Multnomah Railway Company for \$16,000. That subsequent to said purchase, another and larger boat had been placed upon the route, and its capacity is stated. That the granting of the license prayed for, and the establishing of another ferry, will destroy the Albina Ferry and property.

On January 4, 1883, the county court made its decision that a ferry was necessary at the points named, and that it could be operated without *interfering with the operation of any other ferry*, and directing a license to issue as prayed for.

Thereupon the remonstrators filed their petition for a writ of

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review, and the record and proceedings were certified to the Circuit Court.

Upon the hearing in the Circuit Court, counsel for Montgomery and Wilson for the first time made the objection that the remonstrators' license was illegal for want of proof disclosed in the record of the posting of notices of the application, and they made the further objection that the Multnomah Railway Company had no standing, for the reason that a ferry franchise is not assignable, and therefore the assignments to it were void.

The Circuit Court dismissed the petition and review as to the railway company, on the ground last stated, but as to the other petitioners the writ was sustained and the order of the Circuit Court reversed.

From this judgment Wilson and Montgomery appeal as to all the petitioners, and the Multnomah Railway Company appeals from so much of the order as dismissed the writ of review as to it.

Smith, Willis, Gearin & Bellinger, for Multnomah Railway Company.

A ferry license is a franchise. It is a public privilege conferred upon a subject or citizen, and it is the policy of the State that in dealing with such matters the proceedings ought to be conducted publicly, not as a matter affecting private rights, but as a matter of policy. And this is one test whether a statute is directory or mandatory. If the act be within the power of the sovereign, and a strict compliance with the prescribed procedure does not work an injury to private interests, such strict compliance is not indispensable. (*Merchant v. Langworthy*, 6 Hill, 646.) A right of ferry is a thing inherent in the sovereign. It does not emanate from the soil. (*Grant v. Drew*, 1 Oreg. 38; *Peter v. Kendall*, 6 Barn. & C. 703; 3 Kent Com. 424, n., 458; Wash. Real Prop. 264; *Beckley v. Learn*, 3 Oreg. 470.) An order granting a ferry license is not void because it fails to show that the licensee is the owner of one or both sides of the river on which the ferry is located, or that the prior right has been divested. (*Collins v. Ewing*, 51 Ala. 102.) A literal compliance with the statute as to posting notices upon an applica-

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tion for a ferry is not necessary. (*Drew v. Gant*, 1 Oreg. 197.) Montgomery and Wilson having petitioned the county court for the establishment of the plaintiff's ferry, are estopped to deny the legality of the plaintiff's license. (*City of Burlington v. Gilbert*, 31 Iowa, 356; *B. C. R. & M. R. Co. v. Stewart*, 39 Iowa, 267; *Kellogg v. Ely*, 15 Ohio St. 66; *Ferguson v. Landram*, 5 Bush, 230.) The legality of plaintiff's ferry cannot be inquired into except upon a direct proceeding therefor. (*Conner v. Paxson*, 1 Blackf. 168; *Edmonson v. De Kalb Co. supra*; *Churchill v. Grundy*, 5 Dana, 99.) The recognition of plaintiff's ferry by the county court imports its legal existence as a ferry. (*Smith v. Harkins*, 3 Ired. Eq. 613; S. C. 44 Am. Dec. 83.) A ferry license is assignable. (*Billings v. Breinig*, 45 Mich. 70; *Lippencott v. Allander*, 27 Iowa, 460; *Dundy v. Chambers*, 23 Ill. 370; *Filch v. Coyne*, 65 Ill. 83; *Smith v. Harkins, supra*; *Willoughby v. Horridge*, 16 Eng. L. & Eq. 437; *Thompson v. The People*, 23 Wend. 574; *Bowman v. Wathen*, 2 McLean, 376; *Rerick v. Kern*, 14 Serg. & R. 267; *Benson v. The Mayor*, 10 Barb. 240.) A second ferry cannot be established without compensation to the one already existing. (*Enfield Toll Bridge Co. v. Hartford & N. H. R. R. Co.* 17 Conn. 40; *McRoberts v. Washburn*, 10 Minn. 23.) The assignment of a franchise cannot be questioned either collaterally or by any individual whose rights are not affected by it. (*Crolley v. Minneapolis & St. L. Ry. Co.* 30 Minn. 541; *Patrick v. Ruffners*, 2 Rob. (Va.) 209; S. C. 40 Am. Dec. 745; *Elizabeth City Academy v. Lindsey*, 6 Ired. 476; S. C. 45 Am. Dec. 500; *Oakland R. R. Co. v. Oakland B. & F. V. R. R. Co.* 45 Cal. 365; *Owens v. Roberts*, 6 Bush, 608; *Thompson v. R. R. Co.* 3 Sand. 625; *Matthew v. Offley*, 3 Sum. 115.)

J. G. Chapman, and Sidney Dell, for M. A. and Nathan Hackett.

The office of the writ of review is not to review questions of jurisdiction alone, but errors of proceeding or excess of jurisdiction in judicial proceedings. (See *Burnett v. Douglas Co.* 4 Oreg. 388; *Canyonville & G. Road Co. v. Douglas Co.* 5 Oreg.

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281; *Douglas Co. Road Co. v. Douglas Co.* 8 Oreg. 303; *Mountain v. Multnomah Co.* 8 Oreg. 470; *Poppleton v. Yamhill Co.* 8 Oreg. 347; *Knott Bros. v. Jefferson St. Ferry Co.* 9 Oreg. 530.) The license granted by the county court to M. and W. is void. There is no tribunal to enforce the conditions upon which such license was granted. (*Carson v. Stone*, 1 Oreg. 41.) A ferry franchise is property. (*McRoberts v. Washburn*, 10 Minn. 27; *Benson v. The Mayor*, 10 Barb. 228.) If the existing ferry furnished insufficient accommodations to the public, the county court might revoke their license therefor, but could not for that or any cause establish another ferry. (*Lamar v. Commrs. of Marshall Co.* 21 Ala. 772.)

Geo. H. Williams, and H. T. Bingham, for defendants Wilson and Montgomery.

The grant by a county court of a license to keep a ferry is not a contract, but a privilege, subject to any modification the county court may see fit to make. (*Sullivan v. Lafayette Co.* 58 Miss. 790; *Charles River Bridge v. Warren Bridge*, 11 Peters, 536.) Persons intending to apply for license to keep a ferry are required to "give notice of such intention by posting up at least three notices, in public places, in the neighborhood where the ferry is proposed to be kept, twenty days prior to any regular term of the county court at which the application shall be made." (Code, p. 731, § 43.) No such notices were given by Hackett and Finch, and without such notice the county court had no jurisdiction to grant them a license. The obtaining of a license to keep a ferry is exclusively a statutory proceeding, and the statute must be strictly pursued. (*Minard v. Douglas Co.* 9 Oreg. 206; *Robinson v. Mathwick*, 5 Neb. 255; *State v. Otoe Co.* 6 Neb. 132; *Doody v. Vaughn*, 7 Neb. 28; *Damp v. Dane*, 29 Wis. 428.) This court has held that a ferry license is a mere personal trust bestowed upon the grantee. (*Knott v. Frush*, 2 Oreg. 237. See also *Monroe v. Thomas*, 5 Cal. 470; *Thomas v. Armstrong*, 7 Cal. 287; *Sullivan v. Lafayette Co.* 58 Miss. 790.) A

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mere license to a party, without having assigns or equivalent words to them showing that it was meant to be assignable; is only the grant of a personal power to the licensee, and is not transferable by him to another. (*Troy Iron & Nail Factory Co. v. Corning*, 14 How. 217. See also *Brooks v. Byam*, 2 Story, 525.)

LORD, J.—The existence of the plaintiffs' ferry, known as the "Albina Ferry," is admitted by the record. The petition of the defendants rests their application in chief upon the insufficiency of the facilities as already existing and established for the accommodation of the public in crossing the river between the *termini* of the Albina Ferry. As a link to connect the line of travel between these points, the averment is that the facilities are too limited to meet the present and growing demands of the public convenience. The order of the county court not only assumes the legal existence of this ferry, but undertakes, on account of the proximity of the Montgomery Ferry, which its order licenses and establishes to accommodate the same line of travel, and the consequent liability apprehended in the exercise of its franchise of interfering with the passage of the boats of the Albina Ferry and the approach to its landings, to provide for its protection.

The view we take of the question to be adjudicated, as thus presented by the record, renders it unnecessary to notice some of the matters discussed in the briefs of counsel. We shall only examine the record for the purpose of determining whether the county court, to whom the law has confided the authority to grant licenses for establishing ferries upon the conditions therein expressed, has exceeded its jurisdiction, or exercised its functions erroneously, upon the case made by the record, in granting the Montgomery license. The exclusive right of the county court in a proper case to grant a ferry license, when satisfied the same is necessary for the public convenience, is not questioned. The contention is as to the limits within which this power or jurisdiction may be exercised with regard to a ferry licensed and established. Our statute provides that the county court may grant a license to any person entitled and applying therefor, to

keep a ferry across any lake or stream within its respective county, being satisfied that a ferry is necessary at the point applied for, which license shall continue in force for a term to be fixed by the court, not exceeding five years. (Gen. Laws Oreg. § 40, p. 731.) But it further provides that every person licensed to keep a ferry shall have the exclusive privilege of transporting all persons and property across the stream where such ferry is established, and shall be entitled to all the fares arising therefrom. (Gen. Laws Oreg. § 51, p. 733.)

It is argued that the exclusive privileges which attach to the grant of a license by virtue of this last clause, limits and restricts the jurisdiction of the county court in granting licenses to such places only as will not affect injuriously an existing ferry licensed and established by its authority. This proceeds upon the theory that the jurisdiction conferred by the former provision, and the restrictions placed upon its exercise by the latter, when taken and construed together, so as to give them one effect only, declare or adopt the common-law doctrine as applied to ferry franchises; an able and exhaustive *resume* of which may be found in the dissenting opinion of Mr. Justice Story in *Charles River Bridge v. Warren Bridge*, 11 Peters, 506. It is also contended that the doctrine of the law as applied to ferries by the majority, in the decision of the *Warren Bridge Case*, is not opposed to, but sustains and fortifies this construction. This position is that the plaintiffs failed in that case because their charter gave them no exclusive privileges, and the court held, as against the public, such privileges could not be implied; but *e converso*, where such privileges are expressly conferred, the doctrine of the common law would apply. On the other hand, the "exclusive privileges" conferred by our statute are confined to the ferry landings—the place "where such ferry is established"—and does not extend on each side, so as to prevent the licensing of contiguous and rival ferries, when the county court is "satisfied" the public accommodation requires it. That, in effect, the statute but reiterates in express terms the *Warren Bridge Case*, and confines the "exclusive privileges" to the landings or place "where such

ferry is established,” and that no “exclusive privileges” can be implied beyond this, as against the public, or jurisdiction of the county court to license other ferries contiguous, whatever may be the effect of such competition in withdrawing tolls.

In our judgment, the primary object to be accomplished by our statute in conferring jurisdiction upon county courts in their respective counties to establish roads, and to license ferries for the transportation of persons and property across streams which obstruct land travel using public ways, is to secure the public accommodation. For the attainment of this end, but as subordinate to it, when a ferry franchise is granted, the right to take lawful tolls is conferred as an equivalent for the obligation to accommodate the traveling public. Although the taking of such tolls is *privati juris* and incident to the franchise, “a ferry is *publici juris*, and cannot be created without a license, and is a thing of public interest and use.” (*Attorney-General v. Boston*, 123 Mass. 478.) As a link in the chain of transportation on dry land, a ferry forms a part of a public highway, or a connecting link between places in which the public has rights, and as such it is a thing of public interest, and in which the public have the right of way or use on paying certain specified tolls, regulated and prescribed by public authority. This is evident from the nature of the franchise, and the uses and purposes for which ferries are licensed and established. “A ferry,” says Mr. Dane, vol. 2, p. 683, “forms a part of a public passage or highway wherever rivers or waters are to be passed in boats,” and “being a part of the highway, any obstruction of the use thereof is a nuisance.” (*Ang. Highw. § 416.*) The definition of a ferry, as given by Lord Abinger in *Huzzey v. Field*, 2 Crompt. M. & R. 432, 442, is this:—

“A public ferry is a public highway of a special description, and its *termini* must be in places where the public have rights, as towns or villas, or highways leading to towns or villas.”

In *Newton v. Corbett*, Willis, J., in delivering the judgment of the court said:—

“A ferry exists in respect of persons using a right of way where the line of way is across water. There must be a line of

way on land coming to a landing place on the water's edge," etc.

In *Burlington & H. Ferry Co. v. Davis*, 48 Iowa, 133, the court say: "A ferry is in some sense an extension of a public road." Mr. Cooley, in his work on Constitutional Limitations, 593, says in reference to the right of the States to lawfully establish ferries over navigable waters, that "this, also, is only the establishment of a public highway." And in *Sullivan v. Lafayette Co.* 58 Miss. 799, Cooper, J., in delivering the opinion of the court, said :-

"Where a stream crosses a public highway, the continuity of the highway is not broken; it does not end on one side of the stream and begin on the other, but continues across the stream, and the public, for the purposes of travel, have the same right to go on the water over the highway that they have to pass along other portions of it; but as a physical obstruction intervenes, it is necessary that some convenient means of transportation shall be furnished, and the simplest and most economical in many cases is by ferry." (See also *Hudson v. Cuero Land & E. Co.* 47 Tex. 56; *Seal v. Donnelly*, 60 Miss. 662; *Taylor v. Wilmington & M.. R. Co.* 4 Jones (N. C.) 282, 285; *Hartford Bridge Co. v. Union Ferry Co.* 29 Conn. 229.)

The principle to be deduced from these authorities of the nature of the franchise, and the uses and purposes for which a ferry is licensed and established, is that a ferry can only exist in connection with some highway or place where the public have rights, and the grant of a ferry franchise. The grant of a ferry franchise for the transportation of persons and property across a stream to and from a place where there is no highway, or in which the public have no rights, would be void and inoperative. The object of a ferry being to connect highways or places in which the public have rights when intersected by streams, it becomes, when licensed and established, a part of such highway or line of travel between such places. When, therefore, the county court has exercised its jurisdiction by granting a license at the suggestion of the public convenience, and a ferry is established connecting such highways or places, thus forming a con-

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tinuous line of transportation, it has exhausted its jurisdiction as to such places or highways while such franchise exists. As a link or part of the highway in the line of travel between such places or highways, the franchise gives, under our statute, to the person licensed to keep the ferry the exclusive privilege of transporting all persons and property between such places or highways. The county court cannot, at such places or highways, establish another ferry without violating the exclusive privileges secured by the franchise granted to the ferry already established, and which forms a part of such highway, and is designed and required to accommodate all persons, on paying the required tolls, passing along the line of travel between such places or highways. The reason is that the ferry is established for the purpose of taking up the highway, so to speak, and uniting it into one continuous highway or line of travel for the public accommodation; and as a protection for the expense and outlay in thus serving the public convenience, the statute gives the exclusive privilege of carrying all persons and property coming on the line of such highway to the river bank for transportation, at the place "where such ferry is established."

There is no room to establish another ferry; for the ferry already established, by forming a part, continues the highway over the water, and occupies that place. In the sense here applied, it may be said that a highway is already laid out over the water "where such ferry is established," during the period for which the franchise is granted, and until it expires, or be revoked or forfeited. The county court has no jurisdiction to establish another ferry at such place, designed to accommodate the travel passing over such highway "where such ferry is established"; for the statute secures the exclusive privilege as to this to the ferry already established. Construing the statute in the strictest sense, by confining the "exclusive privilege" to the place "where such ferry is established," and it being limited entire to the highway, or place in which the public have rights, of which the ferry forms a part, the conclusion seems inevitable that the county court, having exercised its jurisdiction by the grant of a license to keep a ferry at such

place or highway, cannot exercise it again while such franchise exists. Just outside or beyond this, and not for the purpose of connecting other places or highways in which the public have rights of access, is not within the purview of the authority conferred on the county court by the statute to grant franchises to keep ferries. That would be to establish a ferry where there was neither highway nor public place, without which the public could not be accommodated, and would necessarily be inoperative and void.

Now, the ferry which is sought to be established is shown by the record to be designed to accommodate the same traveling public for which the Albina Ferry was licensed. It founds its claim to the franchise upon the limited facilities and imperfect accommodations furnished by the existing ferry to meet the present and growing demands of the traveling public at the place where it is established, and therefore the right and the need to establish another ferry at such place for the convenience of the public. There is no pretense that it will form connection with any other place or highway, in which the public have rights, than the highway connected by the Albina Ferry, and of which it forms a part. It only claims not to occupy the particular spot where the other ferry lands; but it does not deny its proximity to it, and object to serve the same custom, and to form a part of the same highway which the franchise of the Albina Ferry now covers; and this is assumed and recognized in the order of the court granting the license to it; for the order only seeks to protect the landings and the passage of the boats of the Albina Ferry, but not the exclusive privileges, secured to the Albina Ferry by the statutes as a part of the highway, of transporting all persons and property where it is established. It is the proximity of a rival ferry, carrying passengers from the same place as where the Albina Ferry is licensed, which infringes and violates the exclusive privileges secured by its franchise. When the proximity is such as to produce this result, it is in effect and substance establishing another ferry at the same place as where the Albina Ferry is established, which the county court cannot do without violating the statute which

gives these exclusive rights to the Albina Ferry at the place where established, and therefore the county court is inhibited from licensing another ferry at that place.

When it is considered that the period for which a ferry license is granted is not to exceed five years, the outlay and expense necessarily involved, the duty the law imposes, of keeping safe and commodious boats for transportation, the right of regulating its tolls, and the bond required to be given to better secure and enforce the faithful performance of all the duties and obligations the law imposes and attaches to the franchise in the interest, and for the benefit of the public convenience and accommodation, a just and satisfactory reason is found why our statute secures to every person licensed to keep a ferry the exclusive privilege of transportation across the stream where the ferry is established.

In the case before us, we are not concerned with the power or jurisdiction of the court to establish ferries to connect with other highways or places, although the effect of establishing such, by reason of vicinity, might be to divert the custom and diminish the tolls of an existing ferry; nor of the effect of a change of circumstances produced by an increase of population, or of a new neighborhood requiring the opening of new highways, which would carry with it the right to continue their line across a water highway. We are simply construing our statute with regard to the record before us, for the purpose of ascertaining whether the county court can grant a license to establish a ferry, in substance, at the same place where one is already licensed and established. The statute gives this exclusive privilege of transportation at the place where such ferry is established, and the establishing of another, in substance, at the same place, is in contravention of such exclusive privileges, and beyond the power of the court to do. Whether these exclusive privileges conferred by the statute extend beyond the place where the ferry is established, and include the common-law doctrine of exclusive rights of transportation to such extent on each side as to prevent near and injurious competition, as contended, is not presented by the record before us, nor decided. We only decide, in constru-

ing our statute upon the case made by this record, that the court was without authority to grant the Montgomery license. And here, we think, the case ought properly to have ended. But in the Circuit Court it seems that an objection was raised and argued for the first time as to the validity of the assignment of certain interests in the Albina Ferry license to the Multnomah Railway Company; and the court held that a ferry license, being a personal trust, was not assignable, and therefore such assignment was void.

As this question was argued with much zeal and great ability, we shall briefly advert to it, although we do not see how the validity of that transaction was inquirable into upon the record in this proceeding. There is, no doubt, some contrariety of opinion in the authorities upon this subject. The Albina Ferry license was not granted to the riparian owners; and in *Knott v. Frush*, 2 Oreg. 237, it was held that a ferry license granted to another than the riparian owner is a mere personal trust upon conditions, and their liability cannot be removed by substitution, but that such license terminates upon the decease of the persons to whom it was granted. This decision was the subject of much adverse criticism by counsel. As authorities to sustain its view, it cites *Monroe v. Thomas*, 5 Cal. 470, and *Thomas v. Armstrong*, 7 Cal. 286; and these in turn have been approved and followed in *Wood v. Truckee Turnpike Co.* 24 Cal. 474, and *People v. Duncan*, 41 Cal. 510. The license is regarded as a special privilege conferred by the government upon the individual, and which does not belong to the citizen generally and by common right. The grant of such franchise or special privilege to the individual is considered the bestowal of a personal trust and confidence, which cannot be assigned, nor be the subject of sale under execution. (*Sullivan v. Lafayette Co.* 58 Miss. 791; *Seal v. Donnelly*, 60 Miss. 662; *Ragan v. McCoy*, 29 Mo. 367; *The Maverick*, 1 Sprague, 24; *Arthur v. Commercial etc. Bank of Vicksburg*, 9 Smedes & M. 420; *State v. Rives*, 5 Ired. 307; *Ammant v. Pittsburgh Turnpike Co.* 13 Serg. & R. 210; *Lombard v. Cheever*, 3 Gilm. 473; *Herm. Ex'ns*, §§ 131, 361; *Ang. & A. Corp.* § 191; *Redf. Railw.* 419, 422; *Freem. Ex'ns*, § 179.)

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And again, it has been said that a ferry license is in the nature of an appointment to an office having certain fees annexed to it, to be held at the pleasure of the appointing power. (*Day v. Stetson*, 8 Greenl. 370.) On the other hand, it is contended that the right given under a ferry license is a franchise, which is as much property as any other incorporeal hereditament; that a franchise was, by the common law, said to be a branch of the king's prerogative in the hands of the subject (2 Shars. Bl. Comm. 37); but that in America it was understood to be a particular privilege conferred by grant from the government, and vested in individuals. (3 Kent Comm. 458; *People v. Ulica Ins. Co.* 15 Johns. 358.) Chancellor Kent says that "an estate in such franchise, and an estate in lands, rest upon the same principles, being equally grants of a right or privilege for an adequate consideration." (3 Kent Comm. 458.) In *Conway v. Taylor's Ex'r*, 1 Black, 632, Mr. Justice Swayne said:—

"A ferry franchise is as much property as a rent, or any other incorporeal hereditament, or chattels or realty. It is clothed with the same sanctity, and entitled to the same protection as other property."

In *Lippencott v. Allander*, 2 Iowa, 460, it was held that a ferry license is not vacated, nor the franchise lost, by the death of the party to whom it was granted, but passes to his representatives. This decision is in direct conflict with *Knott v. Frush*, *supra*; and disapproves the reasoning of the authorities cited to sustain it. It should be observed, however, that the Iowa statute makes certain provisions for the sale of such franchise as real property upon execution, which do not exist in our statute, and which were referred to in the opinion as strengthening the view therein expressed. In *Billings v. Breinig*, 45 Mich. 70, it was held that the franchise of keeping a ferry is property, having the valuable incidents of other kinds of property, and transferable from the original grantee to others, subject to conditions lawfully imposed, and to such governmental control as results from its public nature. (*Bowman v. Wathen*, 2 McLean, 376; *Felton v. Deall*, 22 Vt. 170; *Benson v. Mayor*, 10 Barb. 223; *Ladd v. Chotard*, 1 Minor, 366; *Lewis v. Intendant*

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and *Town Council of Gainesville*, 7 Ala. 85; *Willoughby v. Horridge*, 16 Eng. L. & Eq. 437; *Dundy v. Chambers*, 23 Ill. 370.) It thus appears that some diversity of opinion exists in the authorities as to the right to sell or assign a ferry franchise, or whether the same is vacated by death, and that *Knott v. Frush*, *supra*, is not without authority to sustain it. That it may be done when the consent of the power that granted it has been obtained does not seem to be questioned. But whether the county court, to whom the legislature has delegated the power to grant ferry licenses, is authorized to give its consent to a sale or assignment of a ferry license upon filing the requisite bond, or by filing such bond, and the acceptance of the same by the court, the assignment would be unassailable, we are not prepared, nor is it necessary for us to decide, except that it may not be amiss for us to observe that the statute imposes no restrictions upon the sale or transfer of the franchise, nor is there any provision that upon the death of the party to whom the license was issued, it shall be vacated and the franchise lost. The statute is simply silent upon that subject. But whether the assignment is void, or the effect of an assignment would be to vacate the license, we do not see how we can inquire in this proceeding. The record, both as to the petition and the order of the court, recognizes the validity of the existing franchise.

No question is raised by the record about the Albina Ferry license, or any sale or assignment of its franchise. The only question involved was the authority or power of the court to grant the Montgomery license. That was the object, and for which the writ of review was sued out, and the only matter necessary to be passed upon. When this was done, the court had exhausted its power upon the case made by this record, and the decision of matters *dehors* it, without reference to the correctness or incorrectness of the principle decided, was a nullity, and ought not to stand. Besides, if the franchise is a personal trust, and not assignable without the consent of the granting power, as argued and claimed, then the right to object to the transfer of the franchise, and its exercise by a party to whom it was not originally granted, was a right affecting the public, which it

Argument for Respondent.

belongs to its officers to take advantage of by an appropriate proceeding, and could not be collaterally assailed here. (*People v. Duncan*, 41 Cal. 508; *Conner v. Paxson*, 1 Blackf. 168; *Collins v. Ewing*, 51 Ala. 101.)

The judgment declaring the Montgomery license void is affirmed, but in all other respects reversed.

WALDO, C. J., concurred in the result.

[Filed February 17, 1885.]

HACHENY & BENO v. LEARY.

LIFE INSURANCE — FOREIGN CORPORATION — CONSTRUCTION OF STATUTE — DOING BUSINESS. — Taking an application for life insurance by an agent in Washington Territory, and forwarding to the insurance company in Kansas, which alone had authority to accept or reject the application, and where it was accepted, and a policy issued thereon, is not "doing insurance business" in said Territory, within the meaning of the statute thereof; but subsequently taking a note for an installment of the premium on such policy when it became due, and transmitting it to the company in like manner, is doing business within the meaning of such statute.

MULTNOMAH COUNTY. Plaintiff appeals. Affirmed.

The facts are stated in the opinion.

H. H. Northrup, and *W. B. Gilbert*, for Appellants.

The contract of insurance was made in Kansas. (*Lamb v. Bowser*, 7 Biss. 315; *Lamb v. Bowser*, 7 Biss. 372.) Taking the note for an installment of the premium is not even "doing business" in the Territory, much less "doing insurance business." (*Charter Oak Life Ins. Co. v. Sawyer*, 44 Wis. 387; *Payson v. Withers*, 5 Biss. 269; *Graham v. Hendricks*, 22 La. An. 523; *Holmes v. Holmes*, 40 Conn. 117; *Jackson v. State*, 50 Ala. 141.)

Henry Ach, for Respondent.

It has been repeatedly held in this State that any prohibited act, or one done in violation of law, is void. (*Bank of B. C. v.*

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38	841

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Page, 6 Oreg. 431; *In re Comstock*, 3 Sawy. 218; *Simple v. Bank of B. C.* 5 Sawy. 90.) As a matter of law the application for insurance is a part of the contract. (*Commonw. Ins. Co. v. Huntzinger*, 98 Pa. St. 41.) The taking of the note was the doing of an insurance business within the meaning of the statutes referred to. (*Cooper Manuf. Co. v. Ferguson*, 4 Fed. Rep. 498; *Lamb, Assignee, v. Lamb*, 6 Biss. 424; *Smith v. International Life Ins. Co.* 35 How. Pr. 126; *Fletcher v. N. Y. Life Ins. Co.* 13 Fed. Rep. 528; *Æna Ins. Co. v. Harvey*, 11 Wis. 394; *Am. Ins. Co. v. Story*, 1 N. W. Rep. 889; *Price v. St. Louis Mut. Life Ins. Co.* 3 Mo. App. 268; *Bloom v. Richards*, 2 Ohio St. 388.) The Washington Territory law does not say "insurance business," but "business."

LORD, J.—This was an action upon a promissory note made at Seattle, Washington Territory, to one A. B. Covalt, and assigned after due to the plaintiff.

The defense set up is that the note was made in payment of a premium on a life insurance held by the defendant Yesler in a Kansas life insurance company; that the company had an agent at Seattle, Washington Territory, who solicited the insurance in January, 1876, and the note in question was given in August, 1876, at Seattle, in payment of the second semi-annual premium on the policy, and that the note was void, for the reason that the said insurance company was a foreign insurance company, and had not complied with the laws of Washington Territory in regard to foreign insurance companies doing business in the Territory.

It appears by the bill of exceptions that the said Covalt, mentioned in the note, and one Guion, were agents of Alliance Mutual Life Assurance Society, a corporation organized and existing under the laws of the State of Kansas, and were engaged in soliciting life insurance for said company at Seattle, Washington Territory, and in making and taking applications therefor, and in collecting and receipting for premiums thereon. That in January, 1876, at Seattle, in said Territory, the said Guion, as agent of said company, received the application of the defend-

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ant Yesler, together with \$671, the amount of the first premium, for which he gave the said Yesler a receipt, and then turned over said application, and the money so received, to the said Covalt, as agent of the said company, who forwarded the same to Leavenworth, Kansas, for examination and acceptance by the company. That the said company accepted the same, and thereupon issued a policy, which was sent by mail; whether to the defendant Yesler, or to their agent Covalt, to deliver to Yesler, the evidence is conflicting. That when the second semi-annual premium of \$671 became due and payable on the said policy, in August, 1876, the said Covalt called upon the said Yesler for the payment of said premium, who, not having the requisite funds on hand at that time to pay the same, thereupon executed and delivered to the said Covalt the promissory note in question. That the said note was sent to the company, and retained by them until it became due and payable, and then forwarded to Seattle for collection; and upon default of payment being made, the company charged the amount of the same to the account of the said Covalt.

Upon this state of facts the court below instructed the jury that the taking of this note was doing insurance business within the Territory, and the result was a verdict and judgment for the defendant.

The contention of the plaintiff is that the taking of a promissory note in payment of a premium on an insurance policy is not "doing insurance business." Upon the facts as presented by this record, it would seem that the agent was not authorized to make a binding contract of insurance. As between him and the company, he was empowered to solicit and receive applications for insurance, and receipt for the premium money therefor, and to forward them to the company for their approval or rejection.

In *Armstrong v. State Ins. Co.* 61 Iowa, 215, it was held that the agent of an insurance company, who was authorized to take applications for insurance, and receive and receipt for premiums, and forward applications and premiums, and receive from the company policies of insurance when issued, and deliver them to

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the assured, that such agent had no powers or authority to bind the company by a contract of insurance. (*Dickinson Co. v. Mississippi Valley Ins. Co.* 41 Iowa, 286; *Critchett v. American Ins. Co.* 53 Iowa, 404; S. C. 5 N. W. Rep. 543; *Ayres v. Hartford Ins. Co.* 17 Iowa, 176; *Reynolds v. Continental Ins. Co.* 36 Mich. 131; *Morse v. St. Paul F. & M. Ins. Co.* 21 Minn. 407.)

When the defendant Yesler presented and delivered his application, and the premium money therefor, to the agent, to be by him forwarded to the company for its acceptance or rejection, he knew and understood no policy of insurance would be issued unless the company accepted his application. Nor was any contract consummated until the application was accepted, and the policy duly issued.

The final act which made the transaction a binding contract upon the parties was the acceptance of the application. Until this took place it was a mere proposition tendered, to be accepted or rejected. The contract was consummated when the company acted upon the proposal and issued the policy, for then the minds of the parties had met and agreed. "What was before," says Harris, J., "a mere proposition, then became invested with the attributes of a contract, and from that time each party became bound for its performance. If this be so, the contracts are to be regarded as having been made when the company received and accepted the defendant's application, and issued and transmitted to him their policies." (*Hyde v. Goodnow*, 3 N. Y. 270.) It was, therefore, a contract of insurance made and executed in Kansas. (*Lamb v. Bowser*, 7 Biss. 373; *Lamb v. Bowser*, 7 Biss. 315; *Western v. Genesee M. Ins. Co.* 12 N. Y. 261; *Taylor v. Merchants' F. Ins. Co.* 9 How. 400.)

Thus far the case stands clear. When the second annual premium became due on the policy of insurance, the agent called upon the defendant Yesler for its payment, and in lieu thereof, and under the circumstances already indicated, accepted the note in question. And the inquiry now arises whether the taking of the note was doing business in the Territory. To undertake to give an exact definition to the word "business," which could be applied as a test or criterion in every case, would

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be an impossible task. It is said to be a word of large signification, and to denote the employment or occupation in which a person is engaged to procure a living. (*Goddard v. Chaffee*, 2 Allen, 395; *Martin v. State*, 59 Ala. 36.) Under a statute that any person who shall do any manner of labor, business, etc., shall be punished, etc., the loaning of money and taking a note therefor was held to be business within the meaning of such statute. (*Troewert v. Decker*, 51 Wis. 46.) In *Twine v. Larrabee*, 26 Me. 466, it was held that a promissory note made on Sunday, for the price of a horse bought on that day, was void, as being in contravention of the statute prohibiting trade and business. In *Lovejoy v. Whipple*, 18 Vt. 379, the taking of a promissory note, executed upon Sunday, in consummation of a contract previously made, was considered business. "It thus seems," as said by Thurman, J., "to be the common expression of the courts that the making of a contract is business within the meaning of these acts." (*Bloom v. Richards*, 2 Ohio St. 388.) It is the inhibition against doing business on this particular day against which these statutes are directed. It is not that the consideration is illegal or void, as against public policy, but it is the doing of a thing—the making of a contract—on a day when it is prohibited and unlawful, that vitiates the transaction and renders it void. The taking of a note for a loan or debt, or other consideration, is the making of a contract, and is a transaction which signifies business in the sense of these statutes. The transaction is, in fact, the doing of business which, being prohibited on that particular day, is void.

The company was prohibited from doing business in the Territory without compliance with its laws. This it had not done. It had effected an insurance, issued its policy, and the semi-annual premium was due. Was the taking of the note in question by the agent in payment of this premium the doing business in the Territory? Was it a transaction which signifies the doing of business? Tested by the judicial interpretation applied to these statutes, the taking of the note was the making of a contract, which signifies the doing of business, and is within the prohibition of the law.

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In *Smyth v. International Life Ass. Co.* 35 How. Pr. 128, the court held that the acceptance of yearly premiums upon outstanding policies, and of paying the losses thereon which may accrue, was doing business within the meaning of an act taxing all persons who are not residents doing business in the State. The issuing of policies, taking of premium notes, collecting or receiving cash premiums, and adjusting and paying losses, constitute the principal business of insurance companies. (*Lamb, Assignee, v. Lamb*, 6 Biss. 425.) Any or all of these acts, when they involve the making of a contract, import, at least, the doing of business, and if done within the Territory without compliance with its laws are void. The taking of a note for premium money is as much the making of a contract as was the insurance policy. As such, either or both would denote a transaction which signifies business, and if done when or where prohibited would not constitute valid contracts. It is not material that the note was made payable to the agent. The consideration was for premium money due the company, and it was taken by the agent, in his capacity as such, for the benefit of the company. It was as agent for the company, and in its interests and for its benefit, that he transacted the business. He had no other or personal business or dealings with the defendant Yesler. In the person of its agent it was constructively present, making a contract or doing business in violation of the laws of the Territory. This it could not do. To enforce, therefore, the payment of this note would be virtually to disregard the plain provisions of the law, enacted to subserve wise and salutary purposes. (*Pierce v. People*, 106 Ill. 18; *Bliss Life Ins.* § 140.)

“When the legislature prohibits an act,” says Mr. Justice Walker, “or declares that it shall be unlawful to perform it, every rule of interpretation must say that the legislature intended to interpose its power to prevent the act, and as one of the means of prevention that the courts shall hold it void. This is as manifest as if the statute had declared that it should be void. To hold otherwise would be to give to the person or corporation or individual the same right in enforcing prohibited

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contracts as the good citizen who respects and conforms to the law. To permit such contracts to be enforced, if not offering a premium to violate a law, certainly withdraws a large portion of the fear that deters men from defying the law. To do so, places the person who violates the law on an equal footing with those who strictly observe its requirements." (*Cincinnati Mut. H. A. Co. v. Rosenthal*, 55 Ill. 91; *Bank of British Columbia v. Page*, 6 Oreg. 435; *In re Comstock*, 3 Sawy. 218.)

As the note was transferred after it was due, it was open to the defense alleged, which in our judgment is well sustained. There was no error, and the judgment must be affirmed.

THAYER, J., dissenting.—When this case was argued I was very much inclined to the opinion that soliciting and receiving applications for insurance in Washington Territory by an agent of a foreign insurance company, and forwarding them from there to the company, although the agent had no authority beyond the right to forward such applications to be examined and passed upon at the home office, would constitute the doing an insurance business within said Territory, and be in violation of its statutes, unless complied with by the company; but the authorities collected by his honor, JUDGE LORD, and referred to in the opinion prepared by him in this case, have changed my preconceived notions upon the subject, and I concur in that opinion to the extent that the insurance upon the life of Yesler by the Alliance Mutual Life Assurance Society was, as a matter of law, effected at the home office of said company, in the State of Kansas, notwithstanding the application therefor was solicited by the agent Covalt, in Washington Territory, was made there, and forwarded by said agent from there. But I am not able to concur in the opinion that the taking the note sued on for a premium, when the insurance was lawfully effected, was doing business within the meaning of the law of Washington Territory. Nor, under the circumstances suggested, do I believe that the legislature of that Territory intended, or could rightfully pass a statute that would render such an act unlawful. If the insurance was lawful, and the premium notes executed by Yesler

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were valid, I am unable to understand why the company had not the right to collect them, or to adjust the claim by taking Yesler's note, with an indorser, in payment thereof.

If Yesler had been residing in Kansas when the insurance was effected upon his life, and had personally made the application therefor at the home office of the company, had executed the premium notes there, received the policy there, and then emigrated from that State to Washington Territory, it could not be doubted but that the company, as a matter of course, would have had the right to forward those notes, and collect them of him at their maturity. And the right of the company stands upon the same footing in this case as it would have stood in the case supposed, and it would no more be doing business, within the meaning of the laws of Washington Territory, in the one case than in the other.

Yesler owed the company a lawful debt, and how could a territorial or State law be construed consistently so as to prevent its collection? If Yesler had been in possession of the tangible property of the company, and it had attempted to recover it from him in Washington Territory, would not that have been doing business there, just as much as its attempt to recover from him its chose in action would have been? In either case, it would have been an effort to obtain from him that which belonged to it legally, and I do not see how such an endeavor could be adjudged a violation of law.

The Washington Territory law certainly only intends that a foreign life insurance company shall not, except under the conditions it imposes, do its insurance business there. It would, to my mind, be unreasonable to suppose that any company of that character could not enforce a payment of lawful obligations due to it without any compliance with such conditions, and an action instituted in its courts would be doing business as much as receiving a promissory note from a debtor.

If an officer intrusted with the funds of the Alliance Company, at its home office in Kansas City, should run off with them, in violation of his trust, to Washington Territory, could not the company cause his arrest upon civil process, or receive

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indemnity for the injury, without filing in the office of the secretary of that Territory a copy of its articles of incorporation, and appointing an agent as provided in said laws; and would such an attempt to arrest the defaulter, or to obtain satisfaction without suit, be "commencing to transact business in the Territory," within the meaning of said laws? Such a requirement, imposed as a condition for doing such an act, would be strange comity. I fear that such a construction of the statutes of our neighboring Territory would do injustice to the courtesy of its citizens. The language of the statute is:—

"That all corporations now existing or hereafter formed under the laws of the States, etc., shall have full power and authority to sue and be sued, hold, purchase, and acquire, sell, lease, and dispose of, real and personal property, and generally to do and perform any and every act, and transact business within this Territory in the same manner and to the same extent as though said corporation had been organized under the laws of this Territory; provided, that any such corporation hereafter acquiring property or commencing to transact business in this Territory shall first comply with the provisions of section 2 of this act."

The proviso, it will be seen, only extends to "acquiring property," and "commencing to transact business." Taking the note was not "acquiring property," as it was but a novation of a debt; nor was it the "commencing to transact business" within the meaning of the statute.

If the act had provided that no foreign lawyer should practice his profession in that Territory without having first been admitted to its courts, it would not extend to the collection of a fee there, earned somewhere else; or that no foreign merchant should carry on business there without a license, surely a merchant at Portland could sell a bill of goods to a Washington Territory citizen at Portland and send over his claim for collection without such a license. The territorial statute may be a wholesome provision of law, but I am at loss to understand why it should have such a latitudinarian construction as is attempted to be given it. The construction, doubtless, will

Points decided.

operate as a great favor to Yesler. He owed a premium note. It was a legal claim against him. He took it up by giving the note in suit, and although that has been put in circulation and credit been given upon it, yet, upon what appears to me to be a very flimsy reason, he is enabled to repudiate it. Yesler received the full benefit of the note; the consideration was valid. Hacheny & Beno have doubtless parted with goods upon the faith of it; but the former says that his payment and discharge of his legal obligation was, under the laws of Washington Territory, an illegal act, and he is relieved from his liability.

In my opinion, if such a law existed, it would be "more honored in its breach than in its observance." I am in favor of a reversal of the judgment.

[Filed February 25, 1885.]

BENNETT v. NORTHERN PACIFIC EXPRESS CO.

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EXPRESS COMPANY—MODIFICATION OF CONTRACT A QUESTION FOR THE JURY.—A package of money was delivered to the Northern Pacific Express Co. for transportation, addressed to the "Northern Pacific Express Company, Ainsworth, W. T." Subsequently the address was changed by inserting the word "agent" before the word "northern." The money was lost, and in an action therefor, held, that whether such change resulted from a modification of the contract of carriage was a question for the jury.

Id.—CARRIER AND CONSIGNEE—DELIVERY TO CONSIGNEE.—An express company cannot be at the same time both consignee and carrier. Nor is such a company relieved of its liability as a carrier until it has made a personal delivery or tender of the article conveyed to the consignee, if he can be found.

Id.—DELIVERY TO AGENT OF CARRIER.—Where goods are consigned to an owner in care of an agent of the carrier, it seems that delivery to the agent will exonerate the carrier. But such rule stands upon the ground of a tacit understanding between the parties.

FREIGHT RECEIPT—CONDITION—WAIVER.—A condition in an express receipt that the company shall in no case be liable for loss or damage unless the claim thereof shall be presented in writing within ninety days after date of receipt, is waived by the company in not exacting a compliance therewith.

PRACTICE—NONSUIT—WAIVER OF ERROR.—Where a plaintiff has not proved a cause sufficient to be submitted to a jury, yet the defendant after a motion for a nonsuit was made and overruled went into his defense, and supplied the plaintiff's defective evidence, the appellate court will not review the ruling on the motion.

Argument for Appellant.

EVIDENCE—ADMISSION.—A printed notice signed by the superintendent of the company, offering a reward for the recovery of the goods, and which had been posted in conspicuous places, is competent evidence as an admission of liability on the part of the company.

ID.—PROOF OF AGENCY.—It is not error in such a case to permit the agent who received the money to testify as to what capacity and for whom he was acting in the receipt of the money in question.

MULTNOMAH COUNTY. Defendant appeals. Affirmed.

The facts are stated in the opinion.

Rufus Mallory, and *James McNaught*, for Appellant.

It was error to admit in evidence the printed advertisement offering a reward for the arrest and conviction of the perpetrators of the theft. Said paper writing was written, signed, and circulated after said suit had been commenced by said Bennett against said express company to recover said money. Said paper writing was not competent evidence, for the reasons, first, Mr. Footner was not authorized to make admissions. Admissions made after the occurrence by an agent are not evidence against the corporation. (*Furst v. Second Ave. R. R. Co.* 72 N. Y. 542; *Chicago & N. W. R. R. Co. v. Fillmore*, 57 Ill. 265; *Penn. R. R. Co. v. Books*, 57 Pa. 339; *Meyer v. Virginia & Truckee R. R. Co.* 9 Am. & Eng. R. R. Cas. 178.) The circular was admitted for the purpose of proving the continuing liability of the express company as a common carrier of the money after its delivery at Ainsworth. The contract of shipment determines that question. (Lawson on Contracts of Carriers, § 133.) The testimony of Johnson as to the capacity in which he was acting in the receipt of the money in question was incompetent. It is the opinion of the witness in a matter where such an opinion is inadmissible. (*Providence Tool Co. v. U. S. Manuf. Co.* 120 Mass. 35; *Short Mountain Coal Co. v. Hardy*, 114 Mass. 197; *Abbott Trial Ev.* p. 43, § 47.) The court should have allowed appellant's motion for a nonsuit. The shipping receipt is the contract. The express company is the consignee named therein. The delivery of the money

Argument for Appellant.

at Ainsworth to the company's agent is all the company, by the said contract, undertook to do. And this it did. If liable at all for the money thereafter, it must have been as bailee. (*May v. Babcock*, 4 Ohio, 339; *Cincinnati, Hamilton & Dayton M. R. R. Co. v. Pontius*, 19 Ohio St. 236, 237; *Long v. N. Y. Cent. R. R. Co.* 50 N. Y. 76, 77; *Collender v. Dinsmore*, 55 N. Y. 200; *Kirkland v. Dinsmore*, 62 N. Y. 175; *Christenson v. Am. Ex. Co.* 15 Minn. 270; *Steele v. Townsend*, 37 Ala. 247; *Mulligan v. Ill. Cent. R. R. Co.* 36 Iowa, 181. See *Robinson v. Merchants' Dis. T. Co.* 45 Iowa, 470; *McMillan v. Michigan Southern & Northern Indiana R. R. Co.* 16 Mich. 80.) The bill of lading is conclusive evidence of the contract, and its acceptance is sufficient evidence of assent to its terms. (Lawson on Carriers, §§ 102, 112; *Cincinnati H. & D. M. R. R. Co. v. Pontius*, 19 Ohio St. 221; *White v. Van Kirk*, 25 Barb. 16; *Tyler v. Little Rock R. R. Co.* 32 Ark. 393; *The Emily v. Carney*, 5 Kan. 645; *Grace v. Adams*, 100 Mass. 505.) The express company itself is consignee named in the contract. The authorities all agree that a delivery to the consignee of the consignment releases the common carrier from liability as such. (Lawson on Usages and Customs, § 224; *Hoadley v. Northern Transportation Co.* 115 Mass. 304; Lawson on Contracts of Carriers, § 113; *Bank of Kentucky v. Adams' Express Co.* 93 U. S. 174; *York Co. v. Central R. R.* 3 Wall. 107; Hutchings on Carriers, §§ 239, 240; *Mobile & Girard R. R. Co. v. Prewitt*, 46 Ala. 63.) Such a contract is to be construed like all other written contracts according to the legal import of its terms, and it may not be varied by parol evidence. (See Lawson on Contracts of Carriers, § 113; *The Indianapolis & C. R. R. Co. v. Remmy*, 13 Ind. 518; *Oppenheimer v. United States Express Co.* 69 Ill. 62; *Pemberton v. N. Y. Cent. R. R.* 104 Mass. 144; *Southern Pacific Express Co. v. Dickson*, 94 U. S. 549; *Cox v. Peterson*, 30 Ala. 608.) Bennett failed to aver or prove that he had presented the shipping contract with the demand of payment, and this was a condition precedent to the right of recovery. (*Southern*

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Express Co. v. Hunnicutt, 54 Miss. 566; S. C. 28 Am. Rep. 385; *United States Express Co. v. Harris*, 51 Ind. 127; *United States Express Co. v. Caldwell*, 21 Wall. 264; *Adams' Express Co. v. Darnell*, 3 Am. Corp. Cas. 289.) If Bennett was the consignee it was his duty to be at Ainsworth, or have there an agent to whom delivery could be made on the 29th and 30th of January. His failure to have there such person on said days relieves the express company from the stringent rule applicable to common carrier; and if so relieved, the motion for nonsuit should have been sustained. (Hutchinson on Carriers, §§ 385, 386; *Pelton v. Rensselaer & S. R. R. Co.* 54 N. Y. 214; *Fenner v. Buffalo etc. R. R. Co.* 44 N. Y. 511; *Norway Plains Co. v. Boston & M. R. R. Co.* 1 Gray, 263; *Sessions v. Western R. R. Co.* 16 Gray, 132; *Rice v. Boston & W. R. R. Co.* 98 Mass. 212; *Hinckley v. New York Central R. R. Co.* 56 N. Y. 429; *Thomas v. Boston & Prov. R. R. Co.* 10 Met. 472.)

George H. Williams, for Respondent.

The advertisement of a reward signed by the general superintendent of the appellant was competent as an admission of the company that they knew Bennett was the owner of the money, and as an admission tending to show that the money was lost by the company while it was in their possession as a common carrier. This paper, under the testimony of Mr. Footner, is an act of the corporation, as well as an admission. (*Angell & Ames Corp.* § 306; *First Baptist Church v. Brooklyn F. Ins. Co.* 18 Barb. 69.) It was the duty of the company to notify Bennett or his agent of the arrival of the package at Ainsworth, or to use reasonable diligence in attempting to give such notice. After giving the notice the company was liable as a carrier until a reasonable time had elapsed for Bennett or his agent to call for the package. (*Zinn v. New Jersey Steamboat Co.* 49 N. Y. 442; *Smith v. Nashua & L. R. R. Co.* 27 N. H. 86; *Price v. Powell*, 3 N. Y. 322; *McKinney v. Jewett*, 90 N. Y. 270; *Gleadell v. Thomson*, 56 N. Y. 197.) Whether

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the defendant did use proper and reasonable diligence to find the consignee was properly submitted to the jury. (*Wilbeck v. Holland*, *supra*; *West Chester & Philadelphia R. R. Co. v. McElwee*, 67 Pa. St. 311; *Hill v. Humphreys*, 5 Watts & S. 123.) The court will not enforce unreasonable provisions, which may be inserted in the receipts given by the carrier to the shipper. (*Southern Express Company v. Caperton*, 44 Ala. 101; *Railroad Company v. Lockwood*, 17 Wall. 382, 384.) It is immaterial whether the package was addressed "Northern Pacific Express Company," or "Agent Northern Pacific Express Company," if, in fact, the money was shipped upon the responsibility of the company and not upon the responsibility of the person acting as agent; and as to whether the money was shipped upon the responsibility of the company or of the individual acting for the company at Ainsworth was a question of fact for the jury. (*Angell & Ames Corp. § 295*; *Stanton v. Camp*, 4 Barb. 274; *Boston & M. R. R. v. Whitchee*, 1 Allen, 497; *Whitney v. Wyman*, 101 U. S. 392.) Ladd & Tilton were special agents of the respondent, having no authority except to ship the money to the "N. P. Express Co." If the appellants knew the extent of such agency, then the change of the address on the package by adding the word "agent" would not affect the rights of the respondent. (*Delafield v. State of Illinois*, 26 Wend. 220.) The gist of the action is negligence, and if the proof shows that defendant was guilty of gross negligence while in charge of the money, it cannot excuse itself by saying that it was a bailee and not a common carrier. (*Conaughty v. Nichols*, 42 N. Y. 83; *Blossom v. Griffin*, 13 N. Y. 569; Code, §§ 62, 65, 83, 94, 95.)

THAYER, J.—It is alleged in the complaint in this action that the appellant was a corporation, organized by the laws of the State of Minnesota, having agents at the city of Portland, in the State of Oregon, and at the town of Ainsworth, Washington Territory, and at other points in said State and Territory; that on and prior to the 28th day of January, 1884, said appellant was a common carrier for hire, engaged in the express business

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between said city of Portland and said town of Ainsworth, and other points in said State and Territory; that on said 28th day of January, 1884, Ladd & Tilton, bankers in said city of Portland, delivered to appellant, as such common carrier, a package properly secured for transportation, containing currency amounting to \$18,784.27, addressed to appellant, by a written indorsement upon said package as follows, "Northern Pacific Express Co., Ainsworth, W. T."; that said money at said time was the property of the respondent; that appellant received the said package from said Ladd & Tilton, as such common carrier, to be by it transported for respondent from the city of Portland to the town of Ainsworth in consideration of a reasonable consideration to be paid therefor; that at the time it received said money it was notified by said Ladd & Tilton, and knew that the money was the property of the respondent, and was to be transported for him and to be delivered to him or his order at said town of Ainsworth upon his demand; that on the 31st day of January, 1884, respondent demanded said money of the appellant at its office at said town of Ainsworth, but a delivery was refused; and that appellant, as such common carrier, conducted itself so negligently, carelessly, and fraudulently as to the said package of money that it became wholly lost to the respondent; and it is further alleged in said complaint that on the 16th day of February, 1884, said respondent presented to the appellant, at its office in the city of Portland, a written claim and demand for said money, but that appellant refused to deliver or pay respondent the same, or any part of it.

The appellant, by its answer, denied that on the 28th day of January, 1884, it had an office at the city of Portland, or at the town of Ainsworth; denied that it had any knowledge or information sufficient to form a belief that said money was the property of the respondent, or that it received said money to be transported for respondent, or that he was to pay any compensation for the transportation thereof, or that it did transport it for him; denied that it was notified by Ladd & Tilton when it received the money, or ever knew that the money, or any part thereof, was the property of respondent, or was to be transported

for him, or to be delivered to him, or to his order, at any place; denied that respondent demanded said money of appellant, at its office in said town of Ainsworth, at any time, or that it neglected or refused to deliver it; denied that it knew that said package contained said sum of money, or as such common carrier conducted itself negligently, carelessly, or fraudulently as to the same, so that it became lost to respondent, or that, as a common carrier, it conducted itself negligently, etc., as to the transportation of said money, or that respondent lost it by reason of any negligence, carelessness, or fraud of said appellant; and denied that respondent had been damaged by reason of its carelessness etc.; and for a further defense set up the following affirmative matter, viz.:—

“That it is a corporation duly incorporated under the laws of the State of Minnesota, and that its business and powers are stated in its articles of incorporation, and that, under its articles of incorporation, it is authorized to receive money for transportation from the consignor, and transport it over its routes, and deliver it to its consignee, and to collect reasonable charges for transporting the same.

“That under its articles of incorporation it has adopted rules and regulations for the government of its agents in the conduct of its business; that said rules and regulations direct its agents to require of consignors, before the delivery of the money, that the consignor cause the same to be properly and securely tied, sealed, and fastened, and the amount of the money contained therein indorsed on the outside of the package, and the package addressed to the consignee, with the place where the same is to be delivered plainly marked thereon. And said rules and regulations further direct the said agents to deliver the said package to the consignee named and indorsed thereon; that said rules and regulations are the usual and customary rules and regulations adopted by all express companies engaged in business like said defendant; and that on the 28th day of January, 1884, said Ladd & Tilton, bankers mentioned in said plaintiff's complaint, and said plaintiff, had full knowledge of said rules and regulations, and usage and custom.

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“That under said articles of incorporation said defendant could not act as, and be the consignee of money it was transporting for others.

“That said agents, under said rules and regulations, and said usage and custom, had no authority to receive said package of money consigned to the defendant for transportation.

“That on said 28th day of January, A. D. 1884, the said Ladd & Tilton delivered to the defendant's special agents at Portland the said sum of \$18,784.27, secured and consigned as stated in plaintiff's complaint, and the said special agents of the defendant then and there, acting on behalf of said defendant, entered into a contract with said Ladd & Tilton to receive the said package from the said Ladd & Tilton so consigned, and transport the same to said town of Ainsworth. And that in said contract the said Ladd & Tilton and the said defendant further agreed that the said defendant should be liable for said money as a forwarder only. That said contract, in so far as it related to the receiving of said package consigned to the Northern Pacific Express Company, was void. And that said defendant thereafter, on said 28th day of January, A. D. 1884, and while said package was still in the city of Portland, and before the delivery thereof to the express messenger, and while said contract was entirely executory, mutually agreed with said Ladd & Tilton to and did modify said contract so as to consign said package of money and said money to E. E. Johnson. That said E. E. Johnson in said contract was named and called ‘Agent Northern Pacific Express Company.’ That said E. E. Johnson was, on the 28th and 29th days of January, A. D. 1884, the agent of plaintiff and acting for and on behalf of plaintiff, and authorized by plaintiff to receive said package of money.

“That under said contract as modified, the said defendant, within a reasonable time after the delivery to it of said package, forwarded the same to the said town of Ainsworth, and on the 29th day of January, A. D. 1884, at the said town of Ainsworth, delivered the said package of money and the said \$18,784.28 to the said consignee, E. E. Johnson; and the said E. E. Johnson then and there received said package of money,

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opened the said package and counted said money, and then and there, as such consignee, gave the said defendant the usual and customary receipt for said money. And the said defendant's connection with and liability for said money on said delivery to said consignee then and there terminated."

The respondent, in reply to the new matter set forth in the answer, denied the allegations thereof that were at variance with those set out in the complaint, and all the matters in the said answer which were in avoidance of his alleged cause of action. The issues were tried by the said Circuit Court, and a jury duly impaneled, and the said jury returned a verdict in favor of the respondent and against the appellant for the amount of said money, and the interest thereon from the time the respondent claimed it should have been delivered, from which judgment the appeal herein was taken.

The appellant's counsel insist that the said judgment should be reversed, upon the grounds:—

First, that the allegations and proofs show that it performed its contract and duty in regard to the said package of money; and *second*, that the Circuit Court committed error in its rulings on the admission of evidence, and in its instructions to the jury.

It appears from the pleadings and proofs, we think, beyond question, that at the time the money is alleged to have been delivered to the appellant, it was a corporation engaged in the express business between the places alleged in the complaint; that the said package of money was duly delivered to it at Portland for transportation, and that it belonged to the respondent; that the money was never delivered to the respondent. The business relating to the affair had its inception in the sending of drafts by Donnell, Clark & Laribie, bankers at Deer Lodge, Montana Territory, to Ladd & Tilton, at Portland, Oregon. Said drafts were accompanied by a letter of instruction, in the following words:—

"DEER LODGE, M. T., Jan. 24, 1884.

"*Messrs. Ladd & Tilton, Portland, Oregon*—DEAR SIRS:
Please find inclosed our No. A. 3,089, G. G. Sanborn, Local

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Treas., on 1st Nat. Bank, Portland, for \$33,814.27. Please send us your N. Y. exchange for \$15,000, the balance, \$18,814.27, less your charges, please send by *express in currency* to *Northern Pacific Express Co., Ainsworth, Washington Territory*, for the credit and use of *Nelson Bennett*.

"We guaranty signature of *William Bennett* and know that his power atty. is correct and on file in our county records.

"Resp'y,

"DONNELL, CLARK & LARIBIE.

"P. S. We attach certified copy power atty."

The drafts were received by Ladd & Tilton, who delivered the said balance, less charges, to the appellant for transportation, and which constitutes the said package of money, and received from the agent in charge at Portland a receipt therefor, of which the following is the substance:—

"NORTHERN PACIFIC EXPRESS COMPANY.

"*N. P. Express Co.*

"Received of Ladd & Tilton the property hereinafter described, which we undertake to forward to the nearest point of destination reached by this company. . . . In no event shall this company be liable for any loss or damage, unless the claim thereof shall be presented to them in writing at this office, within ninety days after this date, in a statement to which this receipt shall be annexed. The party accepting this receipt hereby agrees to the conditions herein contained:—

DATE.	DESCRIPTION.	WEIGHT.	VALUE OR AM'T.	ADDRESSED TO.	DESTINA- TION.	RECEIVED BY.
Dec. 31,	1 Bag.	D. H.	\$ 5 00	First Nat. Bank.	Seattle,	Cooper.
Jan. 8,	1 Sealed Bag.	Coll.	5,000 00	J. A. Perkins.	W. T. Colfax,	Eufus Ball.
Jan. 28,	1 Pk'g.	Coll.	18,784 27	N. P. Ex. Co., John McGowan.	W. T. Ainsworth,	Ball.
Feb. 13,	1 Bag.	Collect.	1,000 00	O. R. & N. Co.	Whites, N. G.	R.R. Cooper.

It appears also that on the date of the delivery of the package to appellant, Ladd & Tilton sent the following letter concerning the same:—

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"JANUARY 28, 1884.

"*Agent Northern Pacific Company, Ainsworth, W. T.*—DEAR SIR: At the request of Donnell, Clark & Laribie, Deer Lodge, W. T., we send you to-day, by your company's hands, currency, \$18,784.27, for account and use of Nelson Bennett.

"Yours, truly,

[Signed.]

"LADD & TILTON."

It also appears from the deposition of one E. E. Johnson, who was at the time, and had been for some months previously, the appellant's local agent at Ainsworth, Washington Territory, that some time between the 21st and 23d of January, 1884, he received from the respondent a letter, either addressed to "E. E. Johnson," "Mr. Johnson," or plain agent, the witness could not state which, of which the following is the substance:—

"Have ordered money sent from Portland; when received, deliver on order of H. D. Sims, when countersigned by T. B. Taylor.

[Signed.]

"NELSON BENNETT."

The witness testified further as follows:—

"After the receipt of that letter I received a package of money from Portland, addressed 'Agent Northern Pacific Express Company, Ainsworth, W. T.' That package contained \$18,784.27. On the receipt of that package of money I opened it and counted it. I receipted for it on the express company's books. After the receipt of that money I put it in the office safe. I put all of it there. After putting it in the safe, I took out a thousand dollars, carried it around in my pocket an hour or two, and then put it back again. I think I received that money on the 28th or 29th of January, 1884; can't tell which certainly; think it was the morning of the 29th. It is hard to tell how long that money remained in the safe. It was gone on the morning of the 31st. It was taken out of the safe on the night of the 30th, or the morning of the 31st of January. I supposed I closed up the safe on the night after the 30th, and the money was in the safe. At the time I opened the safe on the morning of the 31st, the money was not there. When I opened it, it had been stolen. The day after the money was received

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I received a letter from Ladd & Tilton. I have not that letter now. I have made diligent search for that letter. I can't find it. That letter was received on the morning of the 30th of January."

(Counsel for defendant here exhibited to witness a paper which the witness said was, and identified as, a copy of the letter from Ladd & Tilton.)

"When I received the package of money in question it is hard to tell how many persons were present. They were coming in and going out all the time. Probably from ten to fifteen or twenty. While the money was being counted at Ainsworth, at the time of its receipt, January 29th, and after it was put in the safe, the attention of several persons was drawn to it, and the matter was talked about at the office and in town. I put the money in the same safe which at that time was used by the agent of the company, and which I suppose has since been used for the preservation of money and other valuables shipped by the Northern Pacific Express Company to and from that point. I think it was 1 or 2 o'clock in the day when I took the thousand dollars out of the safe, and took it out in town. I put it back in an hour or two. I exhibited it in two saloons that I know of. I signed the receipt with my name in full immediately after the way bill was entered in the receipt book, and probably before the money had all been counted, as was my usual custom in signing receipts for packages billed to the Northern Pacific Express Company. I have an impression that the letters from Mr. Bennett were addressed to Mr. Johnson, either 'Agent N. P. Ex. Co.' or 'Agent N. P. R. W. Co.' I know his usual custom was to address me as Mr. Johnson in speaking to me."

It also appeared in evidence, from the testimony of H. D. Sims, that in pursuance of instructions received from respondent, in whose employ he was at that time, he called at the express office at Ainsworth on the 31st day of January, 1884, for the purpose of getting the money for respondent; that he asked E. E. Johnson, the agent, if he had any money for Nelson Bennett, to which the agent replied, "yes, plenty of it." The agent then excused himself and went out, saying that he would be back in a minute or two. Witness waited fifteen or twenty

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minutes, and went out to hunt him. In the mean time Johnson came back, and witness followed him in and asked him for the package of money a second time. Johnson again excused himself, and went out the second time. Witness waited for him again about twenty minutes, when he went out and saw Johnson on the opposite side of the street talking with some person. He then came in again. In the mean time No. 2 train came in, going west, and Mr. Morrison, the traveling auditor, got off and went into the depot with Johnson. Witness followed them in, and then asked Johnson for the money, and he said, "I have nothing to do with the office," and referred witness to Mr. Morrison, the auditor, who asked witness what he wanted. Witness told the auditor that he wanted a package of money that respondent had written that he had ordered sent to Ainsworth to witness' order. Morrison then asked Johnson if this was the money in question, and the former said it was. Morrison then said that the money was not there; that it had mysteriously disappeared.

It appeared from the said deposition of the said E. E. Johnson that he was also agent for the Northern Pacific Railway Company during the time he was agent for the appellant, and that the appellant was a contractor in building the railroad for said railway company. Johnson also testified, under objection made by appellant, which will hereafter be noticed, that in the receipt of the said package of money he was acting as agent for the appellant; and he further testified that at no time during the month of January, 1884, was he acting as agent for the respondent. The respondent gave in evidence a circular signed by W. J. Footner, after giving evidence that said Footner was superintendent of the appellant, and that it was within the scope of his business as such superintendent, among other things, to see to the safe delivery of packages of money and other valuables intrusted to the company, and to use all necessary means, including the offering of rewards, for the recovery of money or packages lost while in the company's charge, and that in relation to the money in question he wrote and signed in his official capacity, and had posted in conspicuous places, the said

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circular. The appellant objected to its introduction, but the court overruled the objection, which will also be considered hereafter. The following is a copy of the said circular, viz.:—

“NORTHERN PACIFIC EXPRESS CO.

“OFFICE OF THE GENERAL SUPERINTENDENT, ST. PAUL,
MINN.

“\$1,000 *Reward.*

“The Northern Pacific Express Co. will pay the sum of \$1,000 to any person who will give information sufficient to secure the

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of the party or parties guilty of the recent larceny at Ainsworth, W. T., of a

PACKAGE OF MONEY,

alleged to contain \$18,784.27, belonging to Nelson Bennett; and will also pay in addition thereto ten per cent on all the said money that shall be recovered and paid over to said Nelson Bennett.

W. J. FOOTNER,

“General Superintendent.”

It also appeared in evidence that after the said package of money had been delivered to the agent of the appellant for transportation, addressed and directed as before mentioned, and while the same was in the possession of appellant at Portland, Oregon, the said address was amended by the insertion of the word “agent” before the word “northern”; so that it made the said address read “Agent Northern Pacific Express Co., Ainsworth, W. T.” It was made a material question in the court below as to how this change occurred. It was contended on the part of the appellant that it resulted from a modification of the original contract to transport the said package of money, whereby the said Ladd & Tilton consigned it to the said E. E. Johnson. That, in fact, was the appellant’s main defense in the action, and the proof of it depended, to a great extent, upon the testimony of Mr. Browning, the assistant superintendent of the appellant at Portland, and Mr. Tedford, on one side, and Mr. T. B. Wilcox, the paying teller of Ladd & Tilton, on

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the other. The question was one of fact, and the decision of the jury thereon is necessarily final. It has, however, been discussed in this court to some extent, and the letter of Ladd & Tilton of January 28, 1884, to "Agent Northern Pacific Express Company, Ainsworth," been referred to as corroborative of the appellant's testimony upon the subject. That letter unquestionably tends to show that the package of money might have been intended to be delivered to the agent as consignee, but it certainly is not conclusive upon that point, and the testimony of Mr. Wilcox puts a different phase upon the transaction. The jury doubtless were loth to believe that he would, under the circumstances, with the instruction of Donnell, Clark & Laribie before him as to whom the money should be sent to, and conscious of the consequences that might ensue to his principals in case of a violation of those instructions, deliberately agree to a different arrangement. At all events, I cannot conclude that the question, in the light of all the surrounding circumstances, ought to have been taken from the jury. It was left to them; and for the purposes of this appeal, we must consider their verdict, unless they were misled by erroneous instructions, as determining that no such modification of said contract was agreed upon by said parties. The point last suggested being removed, it becomes necessary to consider the rights and liabilities of the parties in view of the other general circumstances of the case.

The package of money having been delivered to the appellant at Portland, addressed to the appellant at Ainsworth, with the knowledge upon the part of its agents that it belonged to respondent, presents a question as to appellant's duty, considered from that standpoint. It was insisted upon the argument that the appellant, under those circumstances, was itself the consignee, and that its duty as common carrier of the money was performed when it arrived at Ainsworth, and was delivered to its agent Johnson. The claim that the appellant could have been both carrier and consignee is, in my judgment, more fanciful than real. It would be difficult even to imagine how a party could deliver an article to himself. A consignment of

goods, transmitted through the means of a carrier, requires the intervention of the three parties, consignor, carrier, and consignee; and they each maintain an individuality. The two latter could no more be blended than one side of a triangle could be dispensed with and the figure preserved. The carrier's attempt to deliver the article to himself would be absolutely futile. When he begins the effort he has it in his possession, and after he has exhausted the effort he still has it in his possession. The proposition is logically untrue, is not susceptible of demonstration, and to my mind entirely figurative. I am aware that an expression indicating that such a delivery might be made, escaped from the court in *Mobile & G. Ry. Co. v. Prewitt*, 46 Ala. 63. The court said: "Here, then, there was a delivery, as the owner had directed; that is, to the railroad company itself, or to its agents, which was the same thing." But it was evidently an inconsiderate remark. It does not, however, follow that a common carrier cannot be relieved from the extraordinary liability which the law imposes upon that class of persons, although he retain possession of the article transported.

In the case above referred to the railway relieved itself from that character of liability, not by delivering the goods to itself, but by depositing them in its warehouse after the failure of the consignee to be present at the depot, ready to receive them upon their arrival. The goods, consisting of two boxes of merchandise, were ordered by the consignee and shipped by the railroad company, under an agreement, fairly inferable from the circumstances, that the company would transport them to its station No. 6 on its line, and deliver them there to the consignee, if he were present when they arrived; otherwise, would deposit them in its warehouse. The consignee was not present, and the company placed the goods in its warehouse, built, used, and maintained for the purpose, and of which fact the consignee of the goods had full knowledge when he ordered them sent. The case is similar to that of *Thomas v. Boston & P. R. Co.* 10 Met. 472. It belongs to that class of cases where the obligation of a carrier is affected by an established custom and usage. (Ang. Car. 4th ed. § 301.)

A railroad company would hardly be expected to deliver goods transported on its line at a place other than its depot, and a custom has arisen of depositing them, upon their arrival, in a warehouse provided for that purpose, in case the consignee is not then present ready to receive them. The custom may, in such cases, enter into and become a part of the terms of the contract of carriage. The deposit in the warehouse is supposed to be for the accommodation of the consignee, and when such is understood to be the case, the carrier, after such deposit, is relieved from the extraordinary liability of common carrier, and answerable only as an ordinary depositary. No such custom, however, exists in favor of an express company. The latter is not relieved from its liability as carrier until it has made a personal delivery or tender of the article conveyed, in case the consignee can be found. (*Witbeck v. Holland*, 45 N. Y. 13.) The personal delivery of the goods, or tender of them to the consignee, is as much a part of the duty of an express company, and generally of a common carrier, as the transportation of them when received by the carrier for that purpose. In the present case the package of money was received by the appellant, the Northern Pacific Express Company, directed to the Northern Pacific Express Company, Ainsworth, by a superscription thereon written. Its officers and agents knew that it belonged to the respondent. Its agent at Ainsworth had already been advised by the respondent that he had ordered it sent from Portland, and was directed to deliver it, when received, on order of H. D. Sims, countersigned by T. B. Taylor.

Under these circumstances, it was obviously the duty of the appellant not only to carry the package to Ainsworth, but to deliver it personally to the respondent, or upon his order, if the parties could be found; and its duty as common carrier was not performed until reasonable efforts were made by it to inform those parties that the package had arrived and was waiting to be delivered. The case is entirely unlike that of the shipment of goods by a carrier under a known usage and course of business, that they are to be deposited in the carrier's warehouse, or under a contract that the carrier is to hold them for the

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accommodation of the consignee. The appellant's agent at Ainsworth, instead of being engaged in exhibiting part of the money at saloons, should have been making efforts to notify Sims and Taylor that it had arrived and was ready to be delivered. This might have occasioned some inconvenience to the express company, as those parties were some thirty miles away; but that matter should have been considered before it undertook the business, and been provided against.

It is unnecessary to determine what the rights of the parties would have been if the appellant had not known who the money belonged to, and had not been informed to whom it was to be delivered; in other words, if Ladd & Tilton had merely deposited the package with the appellant, addressed in the manner it was, and had not been informed as to who it belonged to, nor been instructed by the owner of it in regard to its delivery. Such was not the case, and the transaction must be viewed in the light of its surroundings. In that view of it, we cannot regard the appellant as the mere depositary of the money at any time prior to the time it was stolen. The delivery of the money to appellant's agent, Johnson, and taking his receipt therefor, did not constitute a delivery that relieved the appellant of its duty in the premises as common carrier. If the jury had found under the evidence that there was expressly or impliedly an agreement that the appellant should deliver the money to Johnson as agent of respondent, our holding would be different. And the authorities seem to hold that, where the goods are consigned to the owner in care of an agent of the carrier, a delivery to such agent will constitute a complete delivery, and exonerate the carrier. But such determination must proceed upon the ground of a tacit understanding between the parties that the carrier's agent was to become the agent of the owner for the receipt of the goods. But, unfortunately for the appellant in this case, the jury made no such finding; on the contrary, they, in effect, found that Johnson was not the agent of the respondent for any such purpose, which completely put an end to that branch of the appellant's defense.

The defense that the respondent failed when he made the

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written demand for the money at Portland on the 16th day of February, 1884, to present the appellant's receipt of its shipment, in conformity with the terms and conditions of the receipt, might, according to some of the authorities, have been a bar to the respondent's action. It is an open question as to whether such a condition in a receipt of that character is reasonable or not; but in any event it was a condition that the appellant had the right to waive, and we are of the opinion that it did waive it by not exacting a compliance therewith when the demand was made. If the payment of the money had been withheld upon that ground especially, the appellant would have been in a condition to claim it as a defense, but it did not require a surrender of the receipt as the alternative of its payment of the loss. Had it done so the probabilities are that the respondent would have complied strictly with the condition, and the lawsuit been prevented. The condition must be supposed to have been inserted in the receipt for the benefit of the appellant, and if its refusal to pay the claim when demanded was upon the ground that it had discharged the duty it owed the respondent, it ought not to be allowed to complain of the non-production of that instrument. Its right to exact it in any case is merely technical, and if insisted on would have the appearance of captiousness. As to whether or not it was a reasonable condition we express no opinion. Our decision of the point is upon the ground suggested: that the appellant waived the right to exact a compliance with it by making a general refusal to pay the money, instead of making it specifically upon that ground. Courts ought to construe conditions that are apparently unimportant, but which, in terms, forfeit a claim if not complied with, strictly. That is supposed to be the rule in all cases of forfeiture.

The other defense, that the respondent should have been at the express office at Ainsworth when the money arrived, ready to receive it, could not be sustained without proof that such was the contract; and the fact that the package was directed as before mentioned, in view of the other facts, did not establish such proof, whatever might have been the effect if it had not

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stood alone. If it could have been inferred from the address upon the package that the appellant was to retain the money at Ainsworth to suit the convenience of some owner who should thereafter call for it, that inference was rebutted by the proof that the appellant knew when it received the package the person to whom it belonged, and had been instructed to deliver it on the order of Sims, countersigned by Taylor; and the appellant's obligation, construed by the facts and circumstances of the case, required it to carry the money from Portland to Ainsworth, and deliver it to the person Sims should, by his order, countersigned by Taylor, appoint to receive it. A delivery was not dispensed with, but on the contrary, it was enjoined. Until such delivery was made, or dispensed with in consequence of the neglect of the respondent, after he or his agents were notified of the arrival of the money to call for it, the duty of the appellant pertaining to the matter was unperformed, and it remained liable in its character of common carrier.

Upon the facts of the case, including those necessarily found by the jury, we conclude that the law is with the respondent, unless there was error in the admission of evidence, or in the instructions the court gave to the jury.

The first exception taken by the appellant was to the ruling of the court upon the motion for a nonsuit. The motion was made after the respondent had submitted certain of his evidence tending to prove facts alleged in his complaint, and the court overruled it. Something was said upon the argument that all the proofs in the case tending to establish the respondent's alleged cause of action had not been given when he rested his case and the motion for a nonsuit was made, but as I understand the rule, that fact is entirely unimportant. If the respondent, when he rested, had not proved a cause sufficient to be submitted to the jury, yet the appellant, after the motion was overruled, went into his defense, and the respondent then supplied his proofs so as to render them sufficient, the appellate court will not review the ruling upon the motion. If the appellant desired to raise the question of the sufficiency of the respondent's proofs at the time he first rested his case, he should

have rested also. This court would not be justified in reversing the judgment in consequence of the refusal to nonsuit the respondent, unless it were satisfied that, from all the evidence given upon the trial, he had failed to prove a cause sufficient to be submitted to the jury. The view we have already indicated regarding the merits of the case disposes of the question of nonsuit, so far as we are authorized to consider it upon this appeal.

The next exception was to the ruling of the court below upon the objection to the admission in evidence of the circular notice, signed by Footner, offering the reward. We think that evidence was competent. It was an admission of the appellant, not one of its agents; an act from which could be inferred an acknowledgment upon the part of the company that it was liable for the loss of the money. That character of evidence is admissible. (*Fox v. Adams' Exp. Co.* 116 Mass. 292.) It mattered not when the circular was issued. It tended to show an acknowledged liability upon the part of the appellant, and was properly received in evidence for that purpose. The act was not conclusive. It was open to explanation, like the adjustment of a loss on a policy of insurance, but, nevertheless, a competent admission to be given in proof.

The next exception was to the ruling of the court upon the objection to the question asked the witness E. E. Johnson, which question was as follows: "In what capacity, and for whom, were you acting in the receipt of the package of money in question?" He answered "that he was acting for the Northern Pacific Express Co." The ground of the objection was that it referred a question of law to the witness; that it called for an answer involving a construction of the contract entered into between the parties, in view of the circumstances under which the package was sent and received by him. But it could not have been so understood by the counsel who put the question, nor by the court who permitted the answer to be given, nor would the witness have been likely to have attempted to answer it if he had supposed that it covered as broad grounds as that. He evidently understood that the inquiry only related to his immediate business connection with the parties at the

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time. In that view the question was proper, but under the other it would have been an affront to the court to have asked it. We are not authorized to presume error, and hence conclude that the question was not intended; nor understood by the court as intended to elicit from said witness his conclusion as to the capacity in which he was acting, and for whom he was acting, in his receipt of the package, formed from the facts and circumstances of the case, but that it was merely an inquiry as to the fact of his relation to the parties in the transaction of the business. He must have known whether he was agent for the express company or for Nelson Bennett in the receipt of the money, or for both, from facts within his own knowledge; and, certainly, he was not expected to state the fact from ulterior facts of which he had no personal knowledge. It is probable that, as between the witness and express company, he might have been the agent of the latter, and at the same time, as between the company and Bennett, have been the agent of Bennett. If Ladd & Tilton had agreed with the express company that the package should be sent to Ainsworth in the manner it was sent, and that Johnson should receive and hold it for Bennett, as between the contracting parties, the law would have regarded Johnson as the agent for Bennett, although he was not privy to the contract. But we have no right to presume that the question asked the witness had reference to any agency of that character, or was so understood. The exception, therefore, was not well taken.

The exception to the ruling of the court upon the objection of appellant's counsel to the question asked the witness Wilcox, as to whether he had received any letter from Donnell, Clark & Laribie, showing their disapproval of his action in the matter of sending the money, is claimed to have been well taken; also the exception to the ruling of the court, upon the objection of said counsel to the question asked the witness H. B. Sims, as to what he did when he arrived at the office of the appellant at Ainsworth, in obedience to certain instructions referred to in the question; but I am unable to understand how the answer to the former question could have affected the verdict of the jury. It

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may not have been material; but it was harmless, and could not have prejudiced the appellant. The latter question, in my opinion, was competent. The respondent had instructed Sims that money would be sent to Ainsworth for respondent, and Sims produced letters of instructions concerning it. I think the objection to that question was properly overruled. The remaining exceptions were taken to the charge given by the court to the jury, and in the refusal of the court to charge as requested by the appellant's counsel. We have examined the several instructions given by the court, and believe them to be substantially correct. The appellant's objections to them, in the main, arise out of the view its counsel takes as to the nature and extent of the duty the appellant was under in regard to the delivery of the money in question. They have been considered, generally, in the review of the merits of the case. The defense interposed by the appellant, that after the package of money was deposited with its agents for transportation and was still in the city of Portland, and before its delivery to the express messenger, the appellant and Ladd & Tilton mutually agreed to modify the contract so as to consign the money to E. E. Johnson, was fairly submitted by the court to the jury. The court went further, and instructed the jury that the appellant was not liable if they found that it was the understanding between Ladd & Tilton and appellant that the latter was to take the money to Ainsworth, and after it arrived there retain it for respondent. By sharp criticism some inaccuracies may be pointed out in reference to the instructions, but they were intelligible, and conveyed to the minds of the jury a correct idea of the law applicable to the facts of the case.

We have also examined the instructions asked to be given to the jury by the appellant's counsel and refused by the court, and we find that they contain no more than the counsel's theory of the case, which they have been endeavoring to establish as a defense. Our view of the matter, embraced in the proposed instructions, has been fully expressed in our consideration of the grounds of the defense, and it is unnecessary to restate it, further than to reaffirm that it is the duty of a common carrier

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to deliver the article personally to the consignee if he be found, and if not found, to use reasonable efforts to ascertain his whereabouts, and to notify him of its arrival; that the carrier's duty in such case is not discharged until such delivery, or until after reasonable efforts have been made to find and notify the consignee as mentioned, and that the carrier will not be considered or treated as consignee of the goods, or relieved from his duty to deliver them, or make reasonable efforts to find the party for whom they are intended, because of the package being addressed to the carrier at a particular place, when he knows the owner and has received directions from him as to whom to deliver it to, unless there has been an understanding between the parties to the transaction that the carrier should hold the package for the convenience of the owner; in which latter case he would, from the time of the arrival of the article, be answerable only as an ordinary depositary thereof.

In this case, the question as to the understanding of the parties upon that subject was properly submitted to the jury, and their verdict is decisive of it. The judgment is therefore affirmed.

MARCH TERM, 1885.



CASES

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF

OREGON.

MARCH TERM, 1885.

[Filed March 10, 1885.]

HILDEBRAND & POSNER v. BLOODSWORTH,
WHITLEY & RIDENOUR.

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26	479

CONTRACT—CONSIDERATION—GUARANTY.—B. and S., copartners, being indebted to plaintiffs, entered into a contract providing that “whereas, S. has this day sold and transferred to B.” his interest in the partnership business, “and is to assume and pay all indebtedness of the firm of B. and S., and indemnify S. against said liabilities; therefore, we, B., R., and W., in consideration of the premises, hereby guaranty the performance of the conditions of said contract on behalf of said B., and undertake to indemnify said S. against said liabilities; *held*, that the undertaking of said guarantors B. and W. was valid and upon sufficient consideration.

ID.—SALE.—The promise to indemnify was as much a part of the consideration of the sale as the promise to pay the indebtedness, and until indemnity was furnished, the sale was incomplete.

UMATILLA COUNTY. Defendants appeal. Reversed and new trial ordered.

The facts are stated in the opinion.

J. J. Balleray, for Appellants.

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By a fair construction, this instrument shows a valid undertaking, based on a sufficient consideration. If the consideration is ambiguous, that is, if it is uncertain whether the sale spoken of was a consummated one or not, the contract should have been admitted, and plaintiffs allowed to explain, by oral testimony, the real state of the facts mentioned in the instrument. (*Hannah v. Shirley*, 7 Oreg. 115; *Richards v. Snider & Crews*, 11 Oreg. 197; Wood Statute of Frauds, p. 704, § 364.) But the instrument sued on is not one that need express a consideration. This contract is not within the Statute of Frauds. That statute in no way affects specialties or contracts under seal, and they need no consideration to support them. (2 Sharswood's Blackst. Comm. p. 445, n. 6; Preston's Sheppard's Touchstone, 57, n. 24; *Jackson v. Alexander*, 3 Johns. 491; *Livingstone v. Tremper*, 4 Johns. 417; Wood Statute of Frauds, 171, § 101; *Douglass v. Howland*, 24 Wend. 39; 2 Smith's Leading Cases, *155, n.; *Williams v. Haynes*, 27 Iowa, 251; *Pintard v. Davis*, 21 N. J. L. 635.)

W. L. Hill, and F. P. Mays, for Respondent.

The instrument sued upon appears on its face to be a promise without any consideration sufficient to support it. There was for the promise of defendants no consideration of benefit or advantage to themselves, or of disadvantage or inconvenience to plaintiffs. Such a promise cannot be enforced. (*Starr v. Earle et al.* 43 Ind. 478; *Rix v. Adams et al.* 31 Am. Dec. 619; *Utica Schenectady R. R. Co. v. Brinkerhoff*, 34 Am. Dec. 220.) This alleged promise of the defendants was collateral to the undertaking of S. E. Bloodsworth to Shaw, and was within the Statute of Frauds. (Civ. Code, § 775; *Leonard v. Vreedenburg*, 8 Johns. 28; *Brewster v. Silence*, 8 N. Y. 207; *Van Doren v. Tjader et al.* 1 Nev. 380; *Crosby et al. v. Jeroloman*, 37 Ind. 264.)

LORD, J. — This was an action for the recovery of money. In substance the facts are that for a long time prior to December 1,

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1883, and during that year, S. E. Bloodsworth and one L. Shaw were partners in the business of retail liquor dealers at Pendleton, Oregon, under the firm name of Bloodsworth & Shaw; that during that year the said firm became, and on the 1st day of December, 1883, were indebted to the plaintiff in the sum of \$934; that on said 1st day of December, Shaw, for a valuable consideration, sold and delivered to his partner Bloodsworth all his interest in the partnership business, and that Bloodsworth agreed, as a part of the consideration of the sale, to pay all indebtedness of the partnership, and to indemnify said Shaw against any liability therefor; that the defendants, in consideration of the above facts, sale, and agreement, did, on the 1st day of December, 1883, execute under seal, and deliver to said Shaw, their certain contract, of which the following is a copy:—

Whereas, L. Shaw has this day sold, assigned, transferred, set over, and delivered to S. E. Bloodsworth, all his right, title, and interest in and to the Arcade Saloon, in the town of Pendleton, Oregon, and by the terms of said bargain and sale the said S. E. Bloodsworth is to assume and pay all indebtedness now existing against the firm of Bloodsworth & Shaw, and to indemnify said Shaw against said liabilities; now, therefore, we, S. E. Bloodsworth, Emsley Ridenour, and S. P. Whitley, in consideration of the premises, hereby guaranty the performance of the said conditions of said contract on behalf of said S. E. Bloodsworth, and undertake to indemnify the said L. Shaw against said liabilities. Witness our hands and seals the 1st day of December, 1883.

[L. S.]

[SEAL.]

[SEAL.]

S. E. BLOODSWORTH.

S. P. WHITLEY.

EMSLEY RIDENOUR.

It is further alleged that the plaintiffs thereafter brought an action at law against S. E. Bloodsworth and L. Shaw, and recovered judgment against them for \$934 and costs, upon which judgment execution was issued and returned wholly unsatisfied; that the judgment remains unpaid; that on the day of the return of the execution Shaw assigned the said instrument of writing

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to the plaintiffs; and that S. E. Bloodsworth has failed to pay the debt due from Bloodsworth and Shaw.

The answer puts in issue all the material allegations of the complaint. On the trial, which was by the court without a jury, the plaintiffs called witnesses who testified to the signatures of the defendants attached to the writing already set forth in full, and that the signatures were attached by the defendants, and thereupon offered the said instrument or writing in evidence. The defendants objected to its introduction on the ground that it was immaterial and irrelevant, and the court sustained the objection. The plaintiff then offered in evidence the transcript of the judgment recovered by the plaintiffs against Bloodsworth and Shaw, of an execution issued thereon and returned unsatisfied, to which defendants objected on the same ground, and the objection was sustained. The plaintiffs then offered a writing, purporting to be an assignment by Shaw to them of the original instrument first offered in evidence, which was objected to on the same grounds, and the objection was sustained.

The main question to be determined arises out of the construction to be given to the indemnity contract. The objection urged below, and strenuously insisted upon here, is that the instrument appears upon its face without any consideration to sufficiently support it. This argument proceeds upon the assumption that the words "has this day sold, assigned," etc., show a completed and past transaction when the indemnity contract was given; that it constituted no part of the consideration for the original transaction, but was a collateral engagement, entered into after the sale had taken place, without any consideration of benefit or advantage for the promise of the defendants, or of disadvantage or inconvenience to Shaw. It is true, as was said in *Starr v. Earle*, 43 Ind. 479, that "a valid consideration for a promise is of the very essence of a contract, and must exist although the contract be reduced to writing; otherwise, the promise is void." (Chitty Cont. 26, 27.) "It need not be of benefit to the party making the promises. It must be of some benefit to himself or to a third person, or some injury, loss, or

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inconvenience to the promisees." (Chitty Cont. 29.) "A mere naked promise to pay the already existing debt of another, without a new consideration, is void." (*Leonard v. Vredenburg*, 8 Johns. 29; Chitty Cont. 52; Story Cont. p. 356, § 433.) And if, by the plain terms of the instrument, it is clear that the property was sold and delivered, then the transaction was complete and ended, and the agreement to indemnify, although given in consideration of it, was for a transaction past and gone, and which did not constitute the inducement or consideration for such agreement or undertaking, when entered into. But is this so? Do the terms of the instrument, construed as a whole, import this effect? For if, at the time the contract of sale was made, it was agreed that this indemnity was to be given, and was a part of the consideration and inducement for it, then it would constitute a sufficient consideration for their undertaking, and ought to be enforced.

While it is true that the instrument says, "Shaw has this day sold," etc., it proceeds to say that, "by the terms of said bargain and sale, the said S. E. Bloodsworth is to assume and pay all the indebtedness now existing against the firm of Bloodsworth & Shaw, and to indemnify the said L. Shaw against said liabilities." Here are distinctly set forth two things which constitute the consideration or inducement for such sale: (1) The assumption and payment of the firm's indebtedness; and (2) the indemnity against any liability arising out of such indebtedness. The promise to indemnify is equally as important a factor of the consideration of such sale as the promise to assume and pay the indebtedness of the firm; and together they constitute the inducement for and consideration upon which the sale is to be made effectual. They are the props upon which the sale is to stand, and which will make it a complete and binding contract when the indebtedness of the firm is assumed and the indemnity furnished. The language is that he "is to assume and to indemnify," and until these things are done there is no sale. When the consideration for a sale is made to depend upon the doing of certain things, such as assuming certain liabilities, and furnishing indemnity against them, as in this

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case, these things must be done before the sale is complete and the title to the property vested. It is clear, therefore, by the terms of the sale, as recited, and which is of the essence of the contract, what was intended and meant by the words "has this day sold," etc. The instrument proceeds: "Now, therefore, we, etc., in consideration of the premises, hereby guaranty the performance of the said conditions of said contract on behalf of said S. E. Bloodsworth, and undertake to indemnify the said L. Shaw against said liabilities."

From what has already been said of the recital, it is manifest that the true interpretation to be given to the word "sold" is "contracted to sell." (*Russell v. Nicoll*, 3 Wend. 118.) It was a contract to sell upon the terms therein provided and already named. It is in consideration of such contract to which the "premises" refer, and in pursuance of which the instrument was given. That contract provided by its terms that Bloodsworth is to assume and pay the indebtedness of the firm, and to indemnify Shaw against such liabilities, and in pursuance of it; and to carry that contract into effect is the consideration for which this instrument was given, whereby the parties undertake to guaranty the performance of the conditions of the contract, and to indemnify Shaw. It was done in pursuance of that contract, and is the consideration upon which it was founded. "Had the contract," said Redfield, J., "been made in pursuance of a contract entered into at the time of plaintiff's becoming surety for Adams to Downer, it would be considered a part of that contract, and upon sufficient consideration." (*Rix v. Adams*, 9 Vt. 233.) This view is consistent with the instrument construed as a whole, is in accord with its manifest intent, and renders it an operative and binding obligation. A contract must be construed so as to give effect to all its parts, and carry out the obvious intentions of the parties; and that construction is to be given to a contract which will make it legal, rather than one which will make it void. (2 Pars. Cont. 500, 505.) As the other objections are dependent upon this, this result precludes the necessity of their examination. The judgment must be reversed and a new trial ordered.

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[Filed March 16, 1885.]

PETERSON v. FOSS.

CONVERSION OF MONEY.—When one person obtains possession of money which *ex æquo et bono* belongs to another, the latter may maintain an action to recover it.

CLATSOP COUNTY. Defendant appeals. Affirmed.

The facts are stated in the opinion.

Fulton Bros., for Appellant.

John Catlin, and *Raleigh Stott*, for Respondent.

THAYER, J.—The complaint in this action contains a number of facts relating to the transaction between the parties, beginning with the sale of land in Washington Territory by the respondent to the appellant, the price therefor, the partial payments made thereon, and the execution of a promissory note to the former by the latter, with J. H. Jones & Co., for the sum of \$2,000. It is further alleged in the complaint that said note was deposited in the safe at the Occident Hotel at Astoria, for respondent; that subsequently the appellant went to said hotel, took said note, and went to Portland and collected the same, but failed to pay said sum of \$2,000 to the respondent; that said note, and the money due thereon, was the property of the respondent, and that he was entitled to the possession thereof; that said appellant had failed to pay said sum to respondent, although the same was past due “and owing,” and that it had been demanded.

The appellant answered the complaint, denying all the allegations thereof, and set up as a further defense, after setting out a history of the transaction as he claimed it, the payment over to the respondent of the \$2,000. The case was tried by a jury, who returned a verdict for the respondent and against the appellant for \$2,092, upon which the judgment appealed from was entered.

When the appeal came on for argument before this court the respondent made a motion to dismiss it, upon the ground that

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the transcript had not been filed within the time required by the statute. It appears that the transcript was not filed with the clerk of this court for a number of days after the time provided in the statute for filing transcripts for the October term, 1884, had expired; but the appellant's counsel produced a stipulation between the attorneys for the respective parties, to the effect that the time for filing it had been enlarged, but no order for such enlargement of the time had been entered. Upon this point the court is not agreed, and express no opinion.

The case has been heard upon the merits, and as the view taken by the court does not affect the ultimate rights of the parties, it has been deemed unnecessary to consider the question of the regularity of the appeal. There is no error in the record that the court has been able to discover. The action was for money had and received by the appellant for the use and benefit of the respondent, and we must, after verdict, conclude that the allegations of the complaint are true, as the jury have so found. The complaint contains redundant matter, but the gist of the action may be discovered, notwithstanding. The essence of the complaint is that the appellant took the note and collected it. When he did so he became possessed of money which equitably belonged to the respondent, and it mattered not whether he rightfully or wrongfully went and took the note. Whenever one person obtains possession of money which, *ex æquo et bono*, belongs to another, the latter may maintain an action to recover it. (*Hoxter v. Poppleton*, 9 Oreg. 487; *Buel v. Boughton*, 2 Denio, 91.)

The issue in this case involved simply the payment of the money over by the appellant to the respondent after the former had collected it. There were no errors in the instructions given by the court to the jury. The case was fairly submitted to them, and their verdict is conclusive upon the question in controversy.

The judgment appealed from is therefore affirmed.

Argument for Respondents.

[Filed March 17, 1885.]

WAGONBLAST v. WHITNEY ET AL.

EQUITY—PAROL AGREEMENT FOR SALE OF LANDS—SPECIFIC PERFORMANCE OF.—

To authorize equity to interfere and enforce specific performance of a parol agreement for the sale of land upon the ground of part performance, it must be clear, certain, definite, just, reasonable, and mutual in all its parts, containing all the elements of a binding obligation, except the written memorandum required by statute.

1D.—PROOF REQUIRED.—To take such a contract out of the statute, the evidence must show the quantity of the land, define its boundaries, and fix the consideration.

1D.—ASSIGNEE.—The rule as to certainty and precision in the terms of the contract is enforced with more stringency against assignees and representatives than between the original parties.

WASCO COUNTY. Plaintiff appeals. Affirmed and bill dismissed.

The facts are stated in the opinion.

W. L. Hill, F. P. Mays, and J. H. Bird, for Appellant.

The case is not within the Statute of Frauds. (*Malins v. Brown*, 4 N. Y. 403; 1 Story Eq. Juris. § 761; Adam Eq. pp. 202–205; *Ramsey v. Liston* 25 Ill. 114.) Time was not of the essence of the contract to convey. (*Taylor v. Longworth*, 14 Peters, 172; *Hepburn v. Auld*, 5 Cranch, 262; Adam Eq. pp. 207, 208; note to *Seton v. Slade*, 2 Lead. Cas. Eq. part 2, p. 18; 1 Sugden Vendors, ch. 5, p. 313; 1 Story Eq. §§ 776, 777.)

L. L. McArthur, for Respondents.

A party seeking to enforce the specific performance of a parol contract for the exchange of lands, must bring himself within the same conditions as though it was a contract for their sale before he can invoke the aid of a court of equity. (*Purcell v. Miner*, 4 Wall. 513.) The contract alleged is vague and uncertain, and the testimony in relation thereto is neither clear nor satisfactory. The general rules applicable to this case are laid down in *Odell v. Morin*, 5 Oreg. 98; *Brown v. Lord*, 7 Oreg.

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12	83
87	617
12	83
42	524
12	83
48	218
48	219

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302; *Waterman Specific Performance*, § 152; *Hart v. Carroll*, 85 Pa. St. 508.) The rule that a specific performance will be refused where the contract is vitiated by uncertainty is applied with more than ordinary stringency against assignees and representatives of the contracting parties. (*Odell v. Morin, supra.*)

LORD, J.—This was a suit to compel the specific performance of a verbal contract to convey lands. For the purpose of showing the nature of the agreement, and the grounds upon which the enforcement of the contract is claimed, the facts alleged are in substance:—

That on the——day of——, 1877 (the exact date plaintiff is not able to state), one J. M. Bird was in the rightful and exclusive possession of the following described lands, in said county of Wasco, to wit, the north half of the northwest quarter and the northeast quarter of the northwest quarter of section 14, in township 1 north, of range 13 east of Willamette meridian, and had the same inclosed with fences; that at the same time the said Jonas Whitney was the owner of a certain farm adjoining the said land on the east and south, and was in possession thereof, and that the most convenient way of travel to and from said farm of said Whitney, and between said farm and the Dalles, was and still is over and across said land of the said J. M. Bird, and the said Whitney, for the convenience of said farm, was desirous of having a right of way over and across said lands of said J. M. Bird, for ingress and egress to and from his said farm; and that he and the said J. M. Bird made and entered into an agreement and contract, by which the said Bird agreed that the said Whitney, and his heirs and assigns, owners of said farm, should have and enjoy the right to pass over and across said lands so possessed by said Bird, and should have such right forever as a right of way appurtenant to said farm; such way to be at and along a line which was agreed to by and between them, and leading from said farm of said Whitney over and across said lands of said Bird to a common highway, or way usually traveled by the public, at the west side of said lands of Bird, outside the inclosure of said Bird; such way

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to remain and be inside the inclosure of said J. M. Bird, and be provided by said Bird with gates or bars for the said Whitney, and his heirs and assigns, to use in passing and repassing, until such time as said Bird, or his heirs or assigns, should pay to said Whitney, his heirs or assigns, the sum of two dollars per acre for the lands hereinafter described, and to be conveyed by said Whitney to said Bird, and then and thereafter said way to be open and unobstructed by gates or bars.

And in consideration thereof, and of the payment of said sum of two dollars per acre for said hereinafter described lands, the said Whitney agreed that said Bird should have, immediately after and from said agreement, the exclusive possession and use of the following described lands, being part of his farm, to wit, that part bounded on the northeast side by a fence erected by said Bird in pursuance of said agreement (and which is still standing), along the northeast side of which said Whitney was accustomed to travel to and from said way over the land of said Bird, viz., Three-mile Creek on the south, and by the north and west lines of the said farm of said Whitney on the north and west; said tract to be conveyed being more particularly described by reference to the public surveys as that part of the southeast quarter of the northwest quarter of section fourteen (14), in township one (1) north, of range thirteen (13) east of Willamette meridian, embraced within the following boundary lines: Commencing at a point on the north line of the southeast quarter of the northwest quarter of said section 14, where the fence erected by said J. M. Bird, as aforesaid, intersects the same, said point being thirteen (13) chains west of the northeast corner of the southeast quarter of the northwest quarter of said section, and running thence south thirty-five degrees east (S. 35 deg. E.) along said fence to Three-mile Creek; thence up Three-mile Creek to where it intersects the west line of the said southeast quarter of northwest quarter of section 14; thence north to the northwest corner of said southeast quarter of northwest quarter of section 14; and thence east to the place of beginning — containing seventeen (17) acres.

And in pursuance of said agreement the said J. M. Bird did

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from that time, and he and his assigns have ever since, permitted the said Whitney, and his heirs and assigns, to use and enjoy said way in accordance with said agreement, and the said Whitney then accepted and entered into the use and enjoyment thereof, and he and his heirs and assigns, have used and enjoyed the same ever since said agreement, and in pursuance thereof; and that the said Whitney, immediately after said agreement was made, and in pursuance thereof, gave to said Bird, and the said Bird accepted the possession of said tract of land, so to be conveyed to him by said Whitney, and the said Bird and his assigns have ever since remained in the exclusive possession and occupation thereof; that the said J. M. Bird, when he took possession of said land so agreed to be conveyed to him by said Whitney, proceeded to build along the northeast side thereof, and on the line thereof, the fence hereinbefore described, which was agreed to be the line of the land to be conveyed to him by said Whitney, and said fence has ever since been maintained and kept up by him and his assigns as a part of their inclosures, and that the said way so agreed to be given or permitted to said Whitney, his heirs and assigns, continues in the same direction as said fence from where it intersects said north line of said southeast quarter of northwest quarter of section 14, along and by the said fence, north about 35 degrees west, to the north line of said lands of J. M. Bird, hereinbefore described, and thence west along said last mentioned line to west boundary line of said lands of Bird, where it connects with said way commonly traveled by the public; . . . that said Jonas Whitney did not during his lifetime convey said land, so agreed to be conveyed by him, to said J. M. Bird or his assigns; that said contract and agreement has been wholly performed on the part of said J. M. Bird and his assigns, so far as the same related to said right of way over their said lands; . . . that the plaintiff has removed all gates, bars, and other obstructions out of said way, and opened the same to the unobstructed use and enjoyment of the defendants, and is ready and willing to pay the defendants said agreed sum of two dollars per acre for said land, so agreed to be conveyed whenever a conveyance thereof is made or decreed,

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and he brings the same, to wit, thirty-four dollars, into court, subject to the order and decree of the court; that the payment of said sum was, by said agreement, to be made only upon and simultaneously with the conveyance of said lands.

The complaint further alleges that said Jonas Whitney died sometime after said agreement was made, and left a will, whereby his wife, Anna Whitney, and the other defendants herein, became proper parties to this suit; and further sets up the transfer by J. M. Bird of his land to J. H. Bird, and of J. H. Bird to this plaintiff, including the seventeen acres so agreed to be conveyed to J. M. Bird by said Whitney, each grantee receiving the possession thereof; and that plaintiff still holds the sole and exclusive possession thereof; that said transfers were made after said agreement, and sometime before the commencement of this suit; and prays the court to decree a conveyance to plaintiff of said land upon the payment of the said two dollars per acre therefor.

The answer denies substantially all the allegations of the complaint. The testimony was taken by deposition, and the Circuit Court, upon the hearing, dismissed plaintiff's bill, from which action plaintiff appeals to this court.

At common law, by virtue of the Statute of Frauds, a contract for the sale of land, when not in writing, was void, and could not be enforced, although part performed. Being a nullity, there was no contract at law, and as a consequence, no rights or duties could arise out of such verbal engagement which either party could enforce in a court of law. In such case the law leaves the parties without any remedy. But it is an obvious principle of justice that a contract, although not in writing, when fairly entered into and part performed, and the relations of the parties are changed, ought not to be evaded. The hardships and injustice growing out of such cases, and for which the law furnishes no form of redress, equity obviates by the specific enforcement of the contract. It treats the contract, and recognizes in the party the same rights which would have existed if the contract had been written.

The ground of the jurisdiction is equitable fraud. It is based upon the just principle that when acts of part performance have

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been done in pursuance of and in reliance on the verbal contract, with the knowledge and consent of the other party, and the relations of the parties are so changed by reason thereof as to prevent a restoration to their former condition, it would be a fraud, and encourage bad faith to permit the statute to be interposed as a defense whereby one party would reap the benefit of the acts of part performance, and the other be left without any remedy, and liable for damages as a trespasser. (3 Pomeroy Eq. Juris. § 1409, n.) Equity will not permit a party to retain an advantage thus gained upon the faith of a verbal agreement, while he repudiates its obligations under cover of a statute. In a word, it will not allow the statute to be used as a cover for fraud and bad faith. But to authorize equity to interfere, and enforce the specific performance of a parol agreement for the sale of land upon the ground of part performance, it must contain all the elements of a binding obligation, and necessary to the enforcement of any contract, except the written memorandum required by the statute. Such a contract, to be specifically executed, must be clear, certain, definite, just, reasonable, and mutual in all its parts, and if it be wanting in any of these essentials it cannot be enforced. Nor is it sufficient that a specific contract be alleged, but it must be clearly and satisfactorily proved in order to take it out of the statute by part performance.

In *Hart v. Carroll*, 85 Pa. St. 510, Woodward, J., in delivering the opinion of the court, said:—

“In order to take a parol contract for the sale of lands out of the operation of the Statute of Frauds, its terms must be shown by full, complete, satisfactory, and indubitable proof. The evidence must define the boundaries, and indicate the quantity of the lands. It must fix the amount of the consideration. It must establish the fact that possession was taken in pursuance of the contract, and at or immediately after the time it was made; the fact that the change of possession was notorious, and the fact that it has been exclusive, continuous, and maintained. And it must show performance, or part performance, by the vendee, which could not be compensated in damages, and such as would make rescission inequitable and unjust.”

In *Sutton v. Myrick*, 39 Ark. 429, the court say:—

“It is now a well-established rule that when parties so far disregard the Statute of Frauds as to enter into parol contracts in violation of its letter, trusting to equity to protect and enforce their contracts in order to prevent fraud, where they are partially performed, they must see to it that their contracts are clearly and conclusively proven; that they have been partially performed; and that the acts claimed to be in part performance are referable to the contract alone, and were done under and in consequence of it; otherwise equity must deny relief.”

Nor will the specific performance of a parol contract be granted, unless it be proved in the clearest manner and substantially the same contract as set out in the bill. (*Brown v. Brown*, 47 Mich. 384.) These are salutary but stringent rules, in the observance of which the interests of society and the public welfare are involved. A party is presumed to know the requirements of the law, and that a contract for the sale of land must be in writing. When he asks a court of equity to interfere, and save him from the consequences of his disregard of the law, the burden of proof is rightfully thrown upon him to show a case outside of the operation of the statute. The court will not interfere to protect his rights, and lend its aid to the enforcement of a contract depending upon parol evidence and part performance, unless he proves the existence of the contract, its terms, and the acts of part performance by clear, satisfactory, and indubitable proof. (*Brown v. Lord*, 7 Oreg. 306; *Odell v. Morin*, 5 Oreg. 98; *Wright v. Pucket*, 22 Gratt. 370; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 278; *Semmes v. Worthington*, 38 Md. 298; *Horn v. Ludington*, 32 Wis. 73; Wat. Spec. Perf. Cont. § 265, notes.)

It only remains to apply these well-settled principles of equity jurisprudence to the case before us. The plaintiff claims to be the assignee of Bird, one of the original contracting parties, and the defendants are the heirs of Whitney, with whom the contract is alleged to have been made. In substance, as alleged, it was that Whitney agreed to let Bird have the land in controversy, and in consideration therefor Bird agreed to pay Whitney

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two dollars per acre, and in addition thereto gave him a right of way over his land. One of the witnesses who heard the agreement, testifying, says:—

“Well, I heard all the conversation there was in the agreement. Mr. Bird wanted this piece of land, and he said to Mr. Whitney that he would like to buy it. Mr. Whitney replied that he would let him have the land for just what he could get land for on the other side of the creek, provided he would give him a right of way to the county road. He said that he wanted an open lane out; that he didn’t want to be bottled up with a gate or bars. Mr. Bird agreed to give him the right of way that he asked for. Mr. Whitney asked me to stake out where Mr. Bird could build the fence.”

The evidence indicates that Bird went into possession of the land in controversy and grew several crops upon it without complying, in any respect, with his part of the agreement. When asked, quite a long while after, why he did not make the lane out, his answer was: “I am pretty slow, but I will come around right after awhile.” He never did “come around right” while he remained in possession of the land, nor the plaintiff, to whom we shall presently advert, until shortly before this bill was filed.

The testimony shows that the right of way to be granted to Whitney by Bird was to be an unobstructed right of way over Bird’s land. He wanted an “open lane,” “didn’t want to be bottled up with gates or bars.” One of the strong inducements moving him to make this agreement was the open lane for his convenience, and to connect his farm with a public road. The evidence shows that neither Whitney nor his devisees were ever granted or allowed such unobstructed right of way, and that no attempt was made by Bird nor the plaintiff to comply with the terms of this contract until a short while before the commencement of the present suit. When the plaintiff went into the possession of the land, he was notified that “if he farmed this land he would have to pay rent; and he agreed that he was to give a third of the crop for the use of it.” This does not seem to indicate that he understood that he had any rights in the

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premises, or that he relied upon the alleged agreement. But waiving this, how does the case thus far stand?

Here is the plaintiff, and those to whose rights he succeeds, claiming to be in the enjoyment and possession of the land in controversy since the making of the alleged parol agreement, cultivating and deriving a profit from it, and without doing anything to enhance its value, or making any valuable or permanent improvements, coming into a court of equity and invoking its aid to enforce such contract without having done or performed, in part or otherwise, those things which were the inducement for the contract, and by which the land in controversy was obtained. This contract was made nearly ten years ago. Bird has passed out of the case, and Whitney has died, and yet during all this time, except the recent liberality of the plaintiff, neither Whitney nor those in his shoes have been permitted to have the unobstructed right of way, which was evidently his principal inducement to make the contract, and perform his part of it at this late day. Under the circumstances disclosed, the case of the plaintiff certainly savors of laches and a want of equity. As to where the right of way was to be located the evidence is not only conflicting, but vague and indefinite. All that is plain is that Whitney was to have an "open lane" over Bird's land, but where is not clearly and satisfactorily answered. If Bird had not been "so slow in coming around right," it might, perhaps, have been identified by possession and user.

Tested by the evidence, there is a lack of certainty as to the description of the land to be conveyed by Whitney to Bird. The assumption has been that he was in possession of the land in controversy, and that this was the identical land which was the subject of the agreement. We have conceded this, but leaving it out of the case, and there is nothing in the evidence to indicate the quantity of the land, nor to fix its boundaries. There is also the same want of certainty in the money part of the consideration, some testifying that the price of the land was to be two dollars per acre, as alleged in the bill, and others that it was to be the price of land on the other side of the creek,

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but where on the other side of the creek, and the price, is left to conjecture. The weight and preponderance of the evidence is undoubtedly against the allegations of the bill, and this the plaintiff confirms by his testimony, upon reflection, when recalled.

In all this there is a lack of that certainty and precision which characterizes written contracts, and which is the special requirement of parol agreements to be specifically executed. To take a parol contract for the sale of land out of the statute, the evidence must show the quantity of the land, define its boundaries, and fix the consideration. The certainty required has reference both to the description and the estate to be conveyed. (*Mathews v. Jarrett*, 20 W. Va. 415; *Hart v. Carroll*, *supra*; *Wat. Spec. Perf.* § 152.) And the rule as to the requirement of certainty and precision in all the terms of the contract is enforced with more stringency, as in this case, against assignees and representatives of the contracting parties. In *Odell v. Morin*, 5 Oreg. 96, the court say:—

“The rule that a specific performance will be refused, where the contract is vitiated by uncertainty, is applied with more than ordinary stringency against assignees and representatives of the contracting parties.”

It is insisted that the title of the plaintiff is left in doubt by the evidence, and that this fact alone ought to be sufficient to defeat the claim of the plaintiff, on the ground that the defendants are not obliged to accept a doubtful title to the right of way. But it is not necessary for us to examine or determine this aspect of the question. We are of the opinion that the court below did not err in dismissing the bill, and the decree must be affirmed.

[Filed March 18, 1885.]

IN RE LEONARD'S APPLICATION TO BE ADMITTED AS AN ATTORNEY.

ATTORNEYS—ADMISSION OF WOMEN TO PRACTICE.—Under existing laws, courts of this State have no power to license women to practice law.

E. B. Watson, for the Motion.

PER CURIAM.—A motion has been made and submitted herein for the admission of Mary A. Leonard as a member of the bar of this court, founded upon certificate of her admission to the Supreme Court of Washington Territory. The statute of this State, applicable to the admission of attorneys, provides that “an applicant for admission as an attorney must apply to the Supreme Court, and must show, (1) that he is a citizen of the United States and of this State, and of the age of twenty-one years, which proof may be made by his own affidavit; (2) that he is a person of good moral character, which may be proved by any evidence satisfactory to the court; (3) that he has the requisite learning and ability, which must be shown by the examination of the applicant by the judges, or under their direction, in open court, at the term at which the application is made. (Code, § 1003.) There is no provision for the admission to the court upon a certificate of admission as attorney to the courts of another State or country, except as provided in section 1005 of the Code, which reads as follows:—

“Whenever it appears that a person of any other State or country is an attorney of the highest court of record of such State or country, he may appear as counsel for a party in a particular action, suit, or before a judicial officer of this State, but not otherwise.”

Yet the courts, both Supreme and Circuit, have followed the practice of admitting attorneys upon certificate of admission to the courts of other States, Territories, and foreign countries, without examination, and, in many instances, without proof of good moral character. Such practice is authorized by the rules of this court, but is not sanctioned by any statute of the State, and has been tolerated by an exuberance of liberality exercised

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by the bench and bar. It is doubtful, indeed, whether the courts ought to exhibit such extraordinary comity, and whether it does not contravene the policy of the State; but it is difficult for lawyers to be illiberal in such matters, and a very questionable practice has grown up in consequence.

The application in this case is somewhat unusual. The applicant has produced a certificate of admission to the courts of Washington Territory, which, under the practice referred to, would ordinarily be regarded as sufficient to entitle a person to admission as an attorney. But the applicant being a woman, the court is in doubt whether it has the right to admit her. The question is not free from embarrassment, and the court would gladly avoid the responsibility of determining it. Courts, however, have no discretion in such cases. They are compelled to follow precedents, as they are evidence of what is law. In a very able opinion delivered by the late chief justice of the Supreme Judicial Court of the State of Massachusetts, now an associate justice of the Supreme Court of the United States, it was held that an unmarried woman was not entitled, under the then existing laws of the commonwealth, to be examined for admission as an attorney and counselor of that court. (*Case of Lelia J. Robinson*, 131 Mass. 376.) The learned judge in that case gave the subject a very thorough examination, cited a great number of authorities, and arrived at the conclusion stated. Upon a reference to those statutes it will be found that they do not materially differ from ours in regard to the civil and political status of women, and consequently the authority is directly in point. It follows, therefore, that the same construction of the latter statutes would render women ineligible to become attorneys in this State. If that view be correct, this court would not be justified in admitting a woman as an attorney upon a certificate of admission to the courts of another State or country. This is the first application of the kind in this State that the court has any cognizance of, and it is very generally understood that women are disqualified from holding such positions. The legislative assembly has not manifested any intention by any act it has adopted to confer such a right upon them, and it

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would be highly improper for the courts of the State to take the initiative in so important a movement. Their province is to follow, and not to attempt to go in advance of, legislative action in such affairs. Whenever the latter authority adopts an enabling act empowering the courts to admit women to the bar, or confers upon that sex other rights, it will be the duty of the former to exercise the power granted, and maintain the rights conferred.

The court is of opinion that it has no authority under the existing laws of this State to admit women as attorneys of this court, and the application is therefore denied.

[Filed March 19, 1885.]

THE STATE OF OREGON v. AARON LURCH.

CRIMINAL LAW—OBTAINING MONEY BY FALSE PRETENSES—EVIDENCE.—Upon trial of an indictment for obtaining money by false pretenses, where the charge is that the accused had obtained money by giving certain forged instruments, purporting to be promissory notes of third parties, as security, representing them to be genuine, the accused may give evidence that the signatures upon the notes were written by himself, under the direction and authority of the persons represented to be the makers.

PROMISSORY NOTE.—A note so signed is not a false writing, but genuine.

LANE COUNTY. Defendant appeals. Reversed and new trial ordered.

W. R. Willis, for Appellant.

J. W. Hamilton, District Attorney, and *Geo. S. Washburn*, for Respondent.

LORD, J.—The defendant was indicted, tried, and convicted for obtaining money under false pretenses. The Criminal Code provides that “upon a trial for having, by any false pretense, obtained the signature of any person to any written instrument, or obtained from any person any valuable thing, no evidence can be admitted of a false pretense expressed orally and unaccompanied by a false token or writing, but such pretense, or

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some note or memorandum thereof, must be in writing, and either subscribed by or in the handwriting of the defendant." (Code, p. 362, § 173.)

The substance of the allegation is that the defendant, intending to cheat and defraud Phoebe B. Kinsey of her money and property, falsely and feloniously did pretend and represent that a certain instrument in writing, purporting to be a promissory note, was the genuine promissory note of Lurch Bros., A. H. Spare, and Samuel Dillard; that the two signatures to the said note, purporting to be the signatures of the said Spare and Dillard, were the true and genuine signatures of the said Spare and Dillard; and that the said Spare and Dillard had signed the said note as security for the payment of the same, when in truth and fact the said note, purporting to be the note of Lurch Bros., and signed by the said Spare and Dillard, was not the genuine note of the said Spare and Dillard, or either of them, nor their true or genuine signatures, or either of them, but were forgeries, which fact the said defendant well knew, etc. . . . by means of which said false pretense and pretenses the said defendant did then and there, etc., unlawfully, knowingly, and feloniously obtain from the said Phoebe B. Kinsey \$900, etc., with the intent to cheat and defraud the said Phoebe B. Kinsey of her goods and money.

By the bill of exceptions it appears that the State, to maintain the issues upon its part, called as a witness Mrs. Phoebe B. Kinsey, who testified that on December 15, 1883, Mr. Washburne, her agent and attorney, came to her house with the defendant and said that the defendant wanted to borrow \$900; that she asked Mr. Washburne what security the defendant could give, and he said he could give the note of Lurch Bros., with Samuel Dillard and A. H. Spare as security. The witness was then asked what the defendant Lurch said to her in regard to getting Dillard and Spare to sign the note, and answered that he told her that he would take the note to Cottage Grove and have it signed by Dillard and Spare, and return it next Monday; this was on Saturday. Washburne being called, testified in substance that the defendant came to his office and wanted to

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borrow \$700 to \$900; that he told him that Mrs. Kinsey had some money to loan, and that they went to see her, and that she said that she would let the defendant have the money if I approved of the security. Being asked what security the defendant said he could give, the witness answered that the defendant said he could give Spare and Dillard. He was then asked: "What did Lurch say at the time in regard to getting Spare and Dillard to sign the note themselves?" and answered that the defendant said that he would take the note to Cottage Grove and get Dillard and Spare to sign it, and return it on Monday. "He came back Monday with the note, and also with some notes as collaterals. I took the notes and collaterals, and gave him the money, \$900." A. H. Spare being called, testified that he did not sign the note described in the indictment, and did not give any person authority to sign it. Samuel Dillard being called, also testified that he did not sign the note, and never authorized anyone to sign the note. Some exceptions were taken to this evidence, and other evidence offered and received, but the purposes of this case do not require us to note them.

The defense then offered to prove by the defendant that the signatures of A. H. Spare and Samuel Dillard upon the note were written by the defendant, under the direction and authority of A. H. Spare and Samuel Dillard. This was objected to, and the exception taken involves the ground of error upon this appeal. The evidence shows that the defendant represented that he could give these names as security for the payment of the note, and it was, in fact, the reliability of these names which induced Mrs. Kinsey to purchase the note. It was the security she was concerned about, and these were the names the defendant offered. Subsequently, when the note was presented with their signatures, or what purported to be their signatures, the note was accepted, and the money thus obtained. Dillard and Spare both testified that they did not sign the note, nor give any authority to anyone to put their signatures to it. In the opening of the case, the defendant had admitted that he had written the names of Spare and Dillard upon the note, but by

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the direction and authority of each of them. This, however, was immaterial; for the record discloses a case had been made against the defendant unless he could obviate the effect of this evidence. Now it seems to us it must be conceded, if both Spare and Dillard did direct and authorize the defendant to put their names or signatures to the note, it became their binding obligation, upon which they were liable, and Mrs. K. got what she bought or contracted for. Although the manual or physical act of writing the names was not theirs, it became so by their direction, consent, and authority, and was, in legal effect, their signatures. Their direction to sign their names was a signing by them, and in such case the signatures would not be forgeries, nor the note spurious. It is not a false writing, but a genuine note. And if this be true the defendant gave to Mrs. Kinsey the security which he represented to her that he could procure, and upon which she parted with her money. The State had deemed it material to prove that the defendant had no authority from Spare and Dillard, or either of them, to sign their names, and if it was, why should not the defendant be allowed to negative and contradict that evidence?

The object of the defendant, by the evidence offered, was to show that he had authority from each of them to put their signatures to the note, for the purpose of showing that the note was genuine, and that their signatures, although written by him, were authorized by them, and not forgeries, and that the security that he had represented he would give had been furnished, and thus obviate the intent of committing the crime with which he was charged. What effect this evidence might have had upon the result was for the jury to determine, and with which we have nothing to do.

We think the evidence was admissible, and that it was error to exclude it. The judgment must be reversed, and a new trial ordered.

Statement of Facts.

[Filed March 19, 1885.]

THE STATE OF OREGON v. AARON LURCH.

12	90
14	313
18	425
6*	408
12*	447
23*	264

19	99
133	121
33	123

CRIMINAL LAW—UTTERING FORGED WRITING—ADMISSION—SIMULATED HAND-WRITING.—Upon the trial of an indictment for uttering a forged writing, to wit, a promissory note, evidence that the name signed to the note had the appearance of being a different handwriting from the body of the instrument is proper, notwithstanding the accused admits that he signed the name, claiming to have had authority to do so.

ID.—INTENT TO DEFAUD SUFFICIENT—CONSTRUCTION OF STATUTE.—To sustain a conviction upon such a charge, under section 592 of the Criminal Code, the State must prove that the accused had made such a use of the forged instrument as might have resulted in injuring or defrauding some one. If the note has been “uttered or published as true and genuine” with intent to defraud, the offense is made out, though no defrauding be actually accomplished.

ID.—CONSTRUCTION OF STATUTE—EVIDENCE OF ACCUSED—CROSS-EXAMINATION OF.—The statute of this State, which allows a person accused of a crime to be a witness in his own behalf (Laws 1880, p. 28), strictly confines the right to cross-examine him to the facts testified to in chief; and it was error to require the defendant on cross-examination to write his own name, or that of another person, when he had not testified in reference thereto in his direct examination.

EVIDENCE—RECALLING WITNESS.—After a witness has testified that he did not sign the note in question, he cannot be recalled to write his name for comparison with the signature to the note.

APPEALS—ERROR—WHEN MATERIAL.—When it does not appear that errors committed at the trial have prejudiced the accused, this court will not ordinarily reverse the case. But where the error consists in the infraction of a constitutional guaranty in favor of personal liberty, the law will presume an injury, and adjudge accordingly.

LANE COUNTY. Defendant appeals. Reversed and new trial ordered.

This was an indictment charging the appellant with knowingly uttering, etc., to one S. H. Friendly, a forged note, purporting to be the note of J. V. Thornton. On the trial the State produced said Thornton as a witness, to show by him that he had not signed the note in question, nor authorized the defendant to do so for him. After the defendant had rested, the plaintiff recalled Thornton, had him write his name to be compared with the signature to the note, and submitted his name so written to the jury.

S. H. Friendly called for the prosecution, testified that in February, 1884, the defendant gave him a check on Corbett & Macleay of Portland for \$428, to cover his indebtedness to the

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witness, which check was protested; that he notified defendant of the fact, and demanded security for his debt; that some weeks later defendant delivered to him the instrument in question with others, as collateral security therefor; that he gave no consideration for the note except that he agreed to extend the time of payment of the check. The check was afterwards paid in full.

The defendant offering himself as a witness, testified that Thornton was owing him, and that the note was given by him in satisfaction of the debt; that witness wrote the note and asked T. to sign it, and the latter replied, "you sign it, my hands are dirty," whereupon witness wrote his name as requested; that he wrote it as much like Thornton's writing as he could, thinking that was the way to make it legal. On cross-examination the defendant was required to write his own name and that of Thornton in his ordinary handwriting, and also to write the latter name as much like the signature to the note as he could. These facts present the errors alleged.

William R. Willis, for Appellant.

J. W. Hamilton, District Attorney, for Respondent.)

THAYER, J.—Among the several grounds of error assigned in this case, there are three which deserve especial notice, viz.: Whether the promissory note alleged to have been forged was uttered or published as true and genuine, with intent to injure or defraud anyone, within the meaning of section 592 of the Criminal Code; whether the court had the right to require the appellant, when upon the stand as a witness, to testify to facts he had not testified to in his direct examination, and to write his name, and that of Lurch Bros., and also of J. V. Thornton; and whether it was proper to recall said Thornton, after he had testified in the case that he did not sign the note, and have him write his name, to be compared with the signature on the note.

The bill of exceptions shows that a large amount of immaterial testimony was taken in the case, which doubtless protracted the trial to an unnecessary length. The question to Thornton, when on the stand as a witness, as to whether he signed his

name to the note, may have been proper as a preliminary question, although it had been admitted by the appellant's counsel in his opening statement to the jury; but the testimony in regard to the note of May 12, 1883, for ninety dollars, to Thornton having paid it, taken a receipt therefor, and the exhibiting and giving in evidence the receipt, was clearly irrelevant.

The evidence that the signature to the note had the appearance of having been written by some one other than the person who wrote the body of the note, was, no doubt, proper, notwithstanding the appellant's admission that he signed Thornton's name to it as maker. His claim that he so signed it by Thornton's direction, and that he acted in good faith, was impeached, to a great extent, by the fact that he disguised his handwriting. He signed Thornton's name to the note, without doubt; but his pretense that the latter directed him to do so might well be questioned when the fact was made known that he attempted to imitate Thornton's handwriting. He undertook, it is true, to explain why he tried to write Thornton's name so as to have it appear as though Thornton wrote it himself, but it was highly proper that the jury should consider whether or not the explanation was satisfactory. It was an important circumstance, and the testimony bearing upon it was rightly submitted to the jury.

The appellant's counsel claims that the transaction in regard to the appellant's delivery of the note in question, with other notes, inclosed in an envelope, to Friendly as collateral security for the payment of the check drawn by the former upon Corbett & Macleay in favor of the latter, could not, in view of the proofs, admitting the note to have been a forgery, have been intended to injure or defraud Friendly as charged in the indictment, and he cites Bish. Crim. Law, § 599, in support of his position. He claims that in order to bring the case within the section of the statute before referred to, Friendly must have parted with something of value, or have in some way obligated himself upon the faith of the particular note, in order to have been injured or defrauded. The State undoubtedly had to prove, in order to secure the appellant's conviction, that he had made such a use of the note as might result in injuring or

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defrauding some one. If his deposit of the note with Friendly could not possibly have injured the latter, the intent to injure or defraud would not have been established. The note must have been "uttered or published as true and genuine," with that intent, before any crime could be claimed to have been committed under the section of the statute; but no injury or defrauding need, in fact, have been accomplished in order to complete the crime. The intent must exist, but it may wholly fail to produce injury or to defraud anyone, and still the crime be committed. The pledge of the note to Friendly, under the circumstances shown by the bill of exceptions, might have resulted in injuring or defrauding him. If the check had not been paid, he could not, as he had a right to suppose, have resorted to the note if it was a forgery. It was left with him to quiet any fears upon his part that he would not receive the amount of the check to apply upon his debt. It was calculated to lull him into security; and although he was not in fact injured thereby, nor defrauded in consequence thereof, yet the intent may nevertheless have existed and the crime been complete.

The appellant knew the note had been forged, if it were forged; knew it was a mere sham, a deceit; yet he pledged it to Friendly to induce him to rely upon it. He could not, therefore, avoid the charge that he intended to injure or defraud; the act, in itself, was a fraud. Under this view the court below properly submitted the case to the jury under the instructions given, and committed no error in refusing the instructions asked by the appellant's counsel.

The Circuit Court, however, did commit error in permitting counsel for the State to examine the appellant, when upon the witness stand, upon matters not testified to by him in his evidence in chief, and in requiring him to write his name and other names, as before suggested. The statute of the State, which allows the accused in such a case to be a witness, provides that when he offers his testimony as a witness in his own behalf, he shall be deemed to have given to the prosecution a right to cross-examine him upon all facts to which he has testified, tending to his conviction or acquittal. (Laws 1880, pp. 28, 29.) But this

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does not compel him to be a witness against himself beyond such cross-examination. The humane principle of the law, that a party shall not be compelled to be a witness against himself, otherwise remains in full force, and is as effectually violated when the cross-examination of the accused is extended beyond the facts to which he has testified, as it would be if he were to be called and made to testify at the instance of the State. The object and purpose of the statute referred to were to afford an opportunity to the accused to relate his account of the transaction in which he is alleged to be implicated, and it would be a great violation of good faith to permit the State to take advantage of his situation and change the trial into an inquisition. The cross-examination in such cases must be strictly confined to the facts testified to by the accused. The law throws around him in such case an immunity which ought to be sacredly maintained.

It was error, also, to allow the witness Thornton to be recalled to write his name, in order to compare it with the signature to the note. He had testified that it was not his signature, and that was as far as counsel for the State should have been permitted to pursue the subject. He was supposed to have told the truth when he said under oath that he did not sign the note. He could not then be allowed to prove or attempt to demonstrate that he had told the truth. Such practice might, perhaps, be permitted upon cross-examination; but it is not proper for the party who calls the witness to undertake to bolster up his evidence in that way.

These errors do not appear to have prejudiced the appellant, and this court, ordinarily, will not reverse a judgment in such a case; but where the error consists of an infraction of a constitutional guaranty in favor of personal liberty, such as the compelling a party accused of a crime to be a witness against himself, the law will presume an injury, and the court have no alternative but to adjudge accordingly.

The judgment appealed from will therefore be reversed, and the case remanded for a new trial.

WALDO, C. J., dissents.

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[Filed March 19, 1885.]

THE STATE OF OREGON v. AARON LURCH.

CRIMINAL LAW—INDICTMENT—FORGERY.—In an indictment for forgery it is not necessary to name any particular person in the indictment as having been defrauded. But the naming of such a person would have the effect to confine the proof of defrauding to the person named.

ID.—EVIDENCE—SIMULATED HANDWRITING.—Where the defendant admitted in his opening statement to the jury that he intentionally wrote the names alleged to have been forged as near like the parties would have written them as he could, evidence is nevertheless admissible to show that such names are in a different handwriting from the body of the instrument.

EVIDENCE—CROSS-EXAMINATION—CONTRADICTORY STATEMENTS.—The rule that when a witness has made statements different from those testified to by him on the trial his attention may be called to them, and if he deny having made them witnesses may be called to prove that he did make them, applied.

LANE COUNTY. Defendant appeals. Affirmed.

The facts are stated in the opinion.

W. R. Willis, for Appellant.

J. W. Hamilton, District Attorney, for Respondent.

THAYER, J.—The appellant herein was indicted by the grand jury of the county of Lane for the crime of forgery, and subsequently tried and convicted of that offense. From the judgment of conviction entered thereon he has appealed to this court. He assigned several grounds of error in his notice of appeal, and which have been submitted for the consideration of the court. We have heard them discussed by the respective counsel in the case, and are of the opinion that no such error was committed as would justify a reversal of the judgment.

The demurrer to the indictment was properly overruled. The latter was in the usual form; charged the appellant with having forged Samuel Dillard's and A. H. Spare's names to a promissory note, made payable to one J. E. Holt, and with the intent to injure and defraud the said Holt.

The counsel for the appellant claimed that the indictment was defective, in that it did not show how any injury had or could occur to the said Holt. Counsel admitted that it was not neces-

sary to name anyone as having been injured or defrauded; but as the prosecution had seen fit to name the payee in the note as the intended injured party, it should have shown how he was or could have been injured. But as we view the question, under our statute, it is a matter of evidence, and not necessary to be alleged; that a charge of an intent to injure or defraud generally, or an intent to injure and defraud a particular person, is sufficient. (Crim. Code, § 600.) The naming a particular person, in such case, would have no effect except to confine the prosecution, in its proof of injury or defrauding, to the particular person named. The admission of testimony to show that the signatures of Dillard and Spare to the note appeared to have been written in a different handwriting than that of the body of the note was proper, although the appellant admitted, in his opening statement to the jury, that he signed the names of the said parties to it. The change of the handwriting was a material circumstance to be submitted to the jury, notwithstanding the appellant admitted that he intentionally wrote the names of the two parties as near like they would have written them as he could, and gave as a reason therefore "that he thought that was the right way to write it to make it legal."

The jury might not be satisfied with such childlike and bland explanation, might believe that it was only a subterfuge, and that it indicated guilt.

The main ground of error was the admission of testimony to contradict the appellant's testimony, called out by the State, as to what he said to Mrs. Kinsey at the time he borrowed \$900 from her, and to Washburne on the same occasion; also what he said to Whipple at Cottage Grove at the time he got money of him, as Mr. Garrott's agent, on the note he gave Garrott. It is a well-established principle of the law of evidence that a witness, upon cross-examination, cannot be examined upon an immaterial or collateral point with a view of contradicting the testimony elicited, in order to impeach the witness. But upon the other hand, when a witness has made statements at another time different from those testified to by him upon the trial, his attention may be called to such statements, and if he deny hav-

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ing made them, witnesses may be called to prove that he did make them. The question here to be determined is whether the evidence objected to, and which is now made the subject of complaint by the appellant's counsel, came within the first or second rule referred to. It will be observed from the bill of exceptions that the appellant, when upon the stand as a witness, was attempting to establish that he had authority from both Dillard and Spare to sign their names to the note. He undertook to show it by showing that he had been accustomed to sign their names to promissory notes with their knowledge and acquiescence. He was asked by his counsel to state what notes he had signed Mr. Dillard's name to, which he had ratified, and answered: "Three notes to Mr. Chrisman, one to Mr. Wingard, and two to Mr. Shultz, one to Garrott." He said: "I also signed the names of Spare and Dillard to a note to Mrs. Kinsey of \$900, for money borrowed from her through Mr. Washburne, her attorney. I saw Mrs. Kinsey about the loan. I went to see her in company with Mr. Washburne." He was then asked by his counsel the following question: "Did Mr. Spear and Mr. Dillard know that you were using their names to notes?" He answered: "They did; they never objected to my using their names." He was then interrogated by his counsel as to what notice Spear had that he was using their names, and he proceeded to mention circumstances showing that Spare knew it. Then the State called out the testimony before referred to; asked the appellant if he did not tell Mrs. Kinsey, at the time he went with Mr. Washburne to see her about borrowing \$900 from her, that Mr. Spear and Mr. Dillard would sign the note with him as security; if he did not tell Mr. Washburne, at the time he got the money of Mrs. Kinsey from him, that Dillard and Spare had signed their names to the note themselves; and if he did not tell Mr. E. W. Whipple, at Cottage Grove, at the time he got the money from him, as Mr. Garrott's agent, on the note that he gave Mr. Garrott, that Dillard had signed his name to that note himself. If this testimony tended to contradict the statements made by the appellant, when on the stand as a witness, in regard to his having had authority to sign Dillard's and

Spare's names to promissory notes, then it was competent, and if the appellant denied making the statements called for by the testimony they could be proved by other parties.

It may, we think, reasonably be inferred from the bill of exceptions that the appellant, by referring to the Kinsey and Garrott notes, intended to have it understood that they were notes he had signed Dillard's and Spare's names to, with the understanding from them that he might do so. But when he dealt with the parties and their agents at the time he borrowed the money, according to their testimony, he represented that he would procure said Dillard and Spare to sign the notes as surety for him, and told them afterwards that they had signed the notes themselves. The appellant attempted to establish that he had authority to sign the names of said parties to the Holt note, from the fact that he had signed their names to other notes, and that they had ratified his acts in so doing; that among the notes he had signed their names to he mentioned those of Mrs. Kinsey and Garrott. Now, if it were a fact that he told the latter parties and their agents that he was going to and had procured said parties to sign the notes themselves, it would hardly be consistent with his statements upon the witness stand. It seems to me that it would have been competent to have inquired of him, upon the cross-examination, whether he told Mrs. Kinsey or the agents of Garrott that he had such authority when he negotiated the loans, and that a suppression of the fact at that time was a circumstance affecting his credibility concerning his pretended claim of authority. The appellant was endeavoring to prove from circumstances that he had such authority, and the signing the two notes referred to was a part of the circumstances from which the fact was to be inferred. Any proof, therefore, showing that the circumstances were unimportant would be material.

If the appellant, when he borrowed the two several sums of money from Mrs. Kinsey and Garrott, had openly avowed what he claimed and testified to at the trial in regard to his authority to sign the names of the two parties to notes, it would certainly have strengthened the evidence upon which he relied to main-

Points decided.

tain his defense. Upon the other hand, if he avoided making any such disclosure, and made statements and representations showing that he had no such authority, it would have tended very much to weaken it, and been incompatible with his testimony. His conduct, upon the occasion of his borrowing the money, according to the testimony of the parties who transacted the business, we think, tended to contradict what he testified to at the trial, and was properly received in evidence for that purpose. At least, it showed that those transactions were not evidence that he had any authority to sign said parties' names to promissory notes.

Judgment is therefore affirmed.

[Filed March 24, 1885.]

**SAMUEL RAMP ET AL. v. E. M. McDANIEL ET AL.,
ADMINISTRATOR.**

ADMINISTRATION—JURISDICTION OF COUNTY COURTS OVER—VOID AND VOIDABLE

ORDER.—The county court has exclusive jurisdiction in the first instance to grant and revoke letters testamentary, and granting administration out of the order provided in section 1053 of the Code would be erroneous, but not a nullity. The persons entitled to precedence could only take advantage of the error by applying for the appointment within the time specified in said section; otherwise they waive their right.

ID.—COLLATERAL ATTACK.—An order appointing or removing an administrator cannot be attacked collaterally.

ID.—WHEN VOID AND WHEN VOIDABLE.—(Per WALDO, C. J., concurring.)—Administration is void when granted by a wrong ordinary, and voidable when granted to a wrong person.

POWERS OF COUNTY COURT IN PROBATE MATTERS—RESIGNATION OF ADMINISTRATOR.

—The powers of the Probate Court are not created by the statute. They are enlarged, limited, or varied. It is not necessary that a resignation, to be valid, should be made in conformity with section 1079 of the Code, requiring notice of intention to resign to be published. Apart from said section it would seem an administrator may, with the consent of the court, resign.

ID.—CONSTRUCTION OF STATUTE—EVIDENCE.—The provision that the persons specified in subdivision 1 of section 1053 shall be deemed to have renounced their right to administration, unless they apply therefor within thirty days, is a rule of evidence rather than of positive law, and the court may appoint any of the persons specified in said subdivision after the thirty days, in preference to those specified in the subdivisions following.

MARION COUNTY. Plaintiffs appeal. Affirmed.

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27* 221

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Argument for Appellants.

The facts are stated in the opinion.

Wm. M. Ramsey, for Appellants.

Lewis Johnson never legally resigned his trust. His attempt to do so, and the proceedings of the court thereon, are absolutely void. (Code Civ. Proc. § 1079; *Haynes v. Meeks*, 10 Cal. 110; *Haynes v. Meeks*, 20 Cal. 288; *Flinn v. Chase*, 4 Denio, 85.) Johnson being still administrator, the court had no power to appoint the respondents. (Cases *supra*; and *Griffith v. Frazier*, 8 Cranch, 11; 3 Redf. on Wills, p. 119; *Matthews v. Doulhitt*, 27 Ala. 273.) The statute clearly contemplates that an application to resign shall be made by a verified petition, as the only way in which the power of the court can be called into action. (Civ. Code, § 1046, p. 316; *Wright v. Edwards*, 10 Oreg. 298.) Where an administrator resigns or is removed, it is necessary that a petition shall have been presented setting forth the jurisdictional facts. (Civ. Code, § 1060; Dayton on Surr. 249; *Shipman v. Butterfield*, 47 Mich. 488.) Under our statute the Probate Court has no discretionary power to ignore the creditors. These had the absolute legal right to administer upon the estate on the failure of the next of kin to apply. Hence, the order of the court appointing respondents was voidable at least, and it is the duty of the court to appoint a creditor. (1 Williams on Exrs pp. 647, 648, 649; *Munsey v. Webster*, 24 N. H. 126; *Williams' Appeal*, 7 Pa. St. 259; *Brunson v. Burnett*, 2 Pinn. 188; *Roy v. Segrist*, 19 Ala. 810; *Rinehart v. Rinehart*, 27 N. J. Eq. 475.) A proceeding instituted for the sole purpose of setting aside a decree or order is a direct and not a collateral attack. (3 Redf. on Wills, p. 123; *Trimble v. Longworth*, 13 Ohio St. 431.) The court may repeal its grant of administration, when made to other than the next of kin or a creditor, as if it be granted to a creditor and a stranger. (1 Williams on Exrs. 6th Am. ed. p. 649.) The so-called *nunc pro tunc* order is void because made *ex parte* and without petition. (Freeman Judgments, § 72 q.)

Holmes & Hayden, for Respondents.

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The court acted judicially in granting letters to respondents, and its action cannot be attacked collaterally. (*Wenner v. Thornton*, 98 Ill. 159; *Housh v. People*, 66 Ill. 178; *Wight v. Wallbaum*, 39 Ill. 554; *State v. McGlynn*, 20 Cal. 233.) The court beyond question had a right to revoke the letters to Johnson. (*Wyman v. Buckstaff*, 24 Wis. 477; *Marsh v. The People*, 15 Ill. 284; *Gillespie v. Rout*, 39 Ill. 247.) On the power to appoint administrators see Civil Code, § 1054; *Guilford v. Love*, 49 Tex. 715.

THAYER, J.—This appeal is from the Circuit Court for the county of Marion. The case originated in the county court for that county, and arose out of probate proceedings in the settlement of the estate of Wesley Howell, deceased. It appears that the appellants are creditors of said estate, and that on or about the 12th day of December, 1884, they filed their petition in the said county court, in which they alleged that they were such creditors of said estate; that the said Wesley Howell died on the 4th day of December, 1883, leaving a will, in which he had nominated and appointed the said Margaret Howell, who is his widow, the executrix thereof; that on the 13th day of the month last mentioned the said will was admitted to probate by the said county court, and letters testamentary were issued to her, but that she failed to qualify; that on the 4th day of January, 1884, one Lewis Johnson, a creditor of the said estate, was appointed by the said county court administrator, with the will annexed, of said estate, and thereupon duly qualified as such administrator.

It is further alleged in said petition that on the 10th day of January next after his said appointment, the said Lewis Johnson tendered to the said county court a resignation of his trust, which the court attempted to accept, and at the same time said court appointed said Margaret Howell as administratrix, and the said Joshua McDaniel, administrator, jointly, with the will annexed, of the said estate; but it is further alleged in the petition that said Johnson gave no notice of the intended resignation of his trust to anyone, and that there was no verified petition upon which the appointment of the said respondents

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was made as mentioned; that neither of the respondents is a creditor of the said estate; that the said Margaret Howell, on said 10th day of January, filed a written renunciation with the clerk of said county court of her right to administer upon said estate under the appointment of the will.

It is further alleged in said petition that said respondents, as such administrators, executed a bond, which was approved by said court on the 11th day of January, 1884, and since that time have been attempting to administer upon the estate; that said McDaniel is not related to said decedent by consanguinity, nor was nor is he a creditor of the decedent, and that the appointment of said respondents as such administratrix and administrator was unlawful; that on the 26th day of April, 1884, said respondents caused the said county court to make and enter of record an order *nunc pro tunc*, stating in substance that said court, on the 10th day of January, 1884, revoked the letters of administration granted to said Johnson on said 4th day of January, on the petition of said Margaret Howell, and stating that said Johnson had due notice of said petition, which facts the appellants in their petition denied, and alleged that the only order made by said county court on said 10th day of January, in the matter of the said estate, was indorsed in substance on the written renunciation of her right to administer on said estate, filed by the said Margaret Howell, and that said *nunc pro tunc* order was null and void; that said estate is largely in debt, and is insolvent; that the appellants were among the principal creditors of said decedent, and their claims were wholly unpaid; that not knowing all the facts with reference to the appointment of said respondents, and believing them to be authorized to allow claims against said estate, they presented to them their claims against the estate, and the respondents, so far as they had legal right, allowed them; that said Lewis Johnson has never made an inventory of said estate, nor published any notice to creditors of the estate, nor taken possession of any property of the estate, nor done any act towards its administration, since said 10th day of January, and has in all respects neglected to discharge the duties of his said trust; that the appellants did not apply to

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said court within the forty days allowed by law to creditors to apply to be appointed administrators thereof, because certain of the creditors had petitioned for the appointment of the said Johnson, and they were satisfied with his appointment; and that they did not apply for the removal of the respondents at an earlier date, as they did not earlier know what their rights were, thinking that they might be bound by the wrongful appointment of said respondents; that it will be necessary to sell all the real property of said estate to pay the debts of the estate, and that it is necessary, in order that said lands may sell for their value at probate sale, that it be sold by an administrator whose right to act is free from doubt; that said respondents knew on said 10th day of January that it would be necessary to sell said land and property to pay the debts of the estate, but they failed and neglected to sell any part of it; that the land had depreciated in price \$2,000, which amount of money would be lost to the creditors through the wrongful and negligent acts of the respondents as such administrators; that they had held and neglected to sell the personal property of the estate until the last month, when they had sold for considerably less money than could have been obtained for it at an earlier date; that it was necessary to appoint an administrator to settle up the estate; and that more than ten of the creditors were competent and qualified to act as such; and prayed the said court that the appointment of the respondents be revoked, and that John Hughes, one of said petitioners, and a principal creditor of the estate, be appointed.

The respondents filed an answer in the said county court to the said petition, in which they denied many of the allegations thereof, including the charges of negligence, and set forth as a defense thereto that from the time of their appointment the respondents had proceeded as speedily as possible in the administration of said estate, in accordance with law in such cases, and the orders and directions of said court; that they then had a petition filed to sell the land belonging to the estate, about to be heard before the said court, and that they believed it would be granted, and that they would proceed as soon as possible to sell it for the interest of all persons interested in said estate, and

that it would bring a much larger sum of money than if sold by anyone else, and be less expensive. The county court heard the issue so made, and denied the prayer of the said petition; from which decision an appeal was taken to the said Circuit Court, where it was affirmed; whereupon the appellants took the appeal to this court.

There was proof made in the county court tending to show that on said 10th day of January, 1884, the respondent Margaret Howell filed a petition in said court, in which it was alleged that the said Lewis Johnson had not proceeded in the matter of said administration of said estate, and in which said petition the said Margaret Howell prayed that his appointment be revoked; that the said Johnson was present in court at the time and tendered his resignation; that it was stated in the said petition that the said Margaret Howell was then prepared to qualify as administratrix with her brother, the said Joshua McDaniel, and that she was the person next entitled to administer the estate under the law; that the said petition was duly verified, and that the said court, acting upon the same, and the facts appearing in connection therewith, revoked the said appointment of the said Lewis Johnson as such administrator, but that said matters were not entered of record at said date, nor thereafter, until the said *nunc pro tunc* order of April 26, 1884, was made; that the said petition of the said Margaret Howell was lost. It also appeared that among the files in said proceedings was found the renunciation of the said Margaret Howell referred to in said appellants' petition, and upon which was indorsed the substance of the order and proceedings alleged in that petition as having been made and taken place on said 10th day of January, 1884.

The appellants assigned a number of errors alleged to have occurred in the probate proceedings, some of which are very apparent. It was improper in the outset to appoint Lewis Johnson as administrator of the estate until after Margaret Howell declined to accept. Her neglect to qualify during the time between the date of her appointment and the time of the appointment of Johnson might be regarded as a declination, but

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it would have been much better to have had her file a renunciation first. Lewis Johnson, after his appointment, had no right to resign, except in the manner pointed out in the statute. An administrator cannot put aside the trust at his own volition. He has no right to consider his own convenience merely in such a case. He must first comply with the requirements of the statute before he has the right to ask leave of the court to resign, and it is not until then that the court can allow it. (§ 1079, Civ. Code.) There are, however, two provisions of the Code which authorize the county court to remove an executor or administrator. (§§ 1062, 1068.) The former section authorizes it upon the application of any heir, legatee, devisee, creditor, or other person interested in the estate; and the latter section would seem to authorize the court to remove him upon its own motion, though the grounds for the removal are the same in both cases. It is claimed by the respondents' counsel that it was under these sections that Johnson was removed, and it appears from the proof that Mrs. Howell did, on said 10th day of January, 1884, institute a proceeding to remove him; and from the *nunc pro tunc* order, that the said court, at said date, made an order for his removal, though it was not entered of record until the 26th day of April, 1884. The proceeding was a very lax affair, however, and shows that a very loose practice was indulged in; a kind of practice that should never be tolerated in administering upon the estate of a dead person, if in any case; yet we would not be justified in deciding that such proceedings did not take place as the county court has adjudged. That court has said, in effect, that a petition was, on said 10th day of January, 1884, filed by Mrs. Howell to remove Johnson as such administrator; that it was properly verified; that Johnson was in court on that day and assented to it; and that the court then made an order revoking his appointment. The petition may not have been sufficient to warrant the revocation of the letters of administration, but the court certainly had jurisdiction of the subject-matter and of the parties, and the decision of the court thereon cannot be attacked collaterally.

It was claimed upon the argument that this was a direct proceeding; but I do not think it could be so regarded in any event between the present parties, whatever might be the case had it been instituted by Johnson. The appointment of the respondents to administer upon the estate is in the same condition. That act of the county court was evidently erroneous. It could not regularly appoint Mrs. Howell and McDaniel at any time between the expiration of the thirty days and of the forty days mentioned in section 1054 of the Code; but the appellants could only take advantage of the irregularity by applying for the appointment within that time. Their right now to have the respondents removed is confined to the causes specified in said section 1062 of the Code. If the respondents have neglected their trust, they can be removed at the instance of the appellants, but not in consequence of the irregularity referred to, unless they are able to establish that the appointment was a void act. But I do not think that view can be maintained. The county court has exclusive jurisdiction in the first instance to grant and revoke letters testamentary and of administration (Code, § 869), and granting administration out of the order provided in section 1053 of the Code would be erroneous, but not a nullity. The party entitled to precedence could certainly waive the right, and would do so under the statutes of this State, unless the application was made within the time specified in said section 1053. The appellants, under the circumstances of this case, had no standing to question the authority of the respondents to administer upon the estate in question, nor to apply for their removal except for some cause specified in said section 1062. They claimed in their petition that the respondents had been unfaithful to and had neglected their trust, but they failed to substantiate it. The respondents are legal administrators of the said estate, and their acts in administering upon it are as valid as though the appointment of them had been regular in the first instance.

The judgment appealed from will therefore be affirmed.

WALDO, C. J., concurring.—The marginal note to *Black-*

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borough v. Davis, 1 Salk. 38, says: "Administration void when granted by a wrong ordinary, and voidable when granted to a wrong person." So, if administration be granted to another, a former administration unrevoked, the latter grant is void. (*Griffith v. Frazier*, 8 Cranch, 9; *Matthews v. Douthitt*, 27 Ala. 273.) Hence, while the grant of administration to Howell and McDaniel, relatively to the appellants, simply, is at most voidable only, yet, relatively to Johnson, if his letters be not revoked, it is void. The Probate Court has power to revoke administration only for just cause. (1 *Williams Ex'rs*, 576; Civ. Code, pp. 319, 320.) But barring section 1079, it should seem that the administrator may, with the consent of the court, resign his trust. In *McGowan v. Wade*, 3 Yerg. 375, the records showed the following entry: "This day came Robert Wade and James Wade, and with the assent of the court, surrendered the administration," and it was held a good revocation. (And see *Marsh v. People*, 15 Ill. 286, 287.) It hardly seems to follow necessarily in all cases that a resignation, to be valid, must be made in conformity with section 1079, requiring notice of intention to resign to be published. The powers of the Probate Court are not created by the statute. They are enlarged, limited, or varied. This section seems intended to apply where the administrator has entered on the execution of the duties of his trust, and has assumed actual fiduciary relations towards the estate. If so, the conditions implied by the statute must exist before the rule it prescribes shall be held to govern.

Now, Johnson did nothing under his appointment; assumed no actual fiduciary relations to the estate. It should seem, therefore, that the power of the court to revoke his letters (he consenting) is not affected by the statute, and consequently that his letters were legally revoked. If this be so, the appointment of Howell and McDaniel is not void, and the only question is whether it be voidable. When the statute provides that the person specified in subdivision 1 of section 1058 shall be deemed to have renounced their right to the administration unless they apply therefor within the thirty days, I take it that the provision should be construed rather as a rule of evidence than as a

Points decided.

positive rule of law, and that the court may appoint any of the persons specified in said subdivision 1, after the thirty days, in preference to those specified in the subdivision following; that such persons do not become unqualified persons after the thirty days. Under this view Margaret Howell was not unqualified, and the appointment only became irregular because McDaniel was joined with her. Thus, in *Brown v. Wood*, Aleyn, 36, cited 1 Williams Ex'rs, 580, administration granted to a sister next of kin, and to her husband, was irregular because, "if she should die before him, he should continue administrator against the meaning of the statute." But in this case, no application having been made for the revocation of the letters until long after the time when the court had full power to appoint McDaniel, the irregularity has been waived; and the appellants cannot now be heard to question the appointment. "Parties are not required to insist upon every privilege which is given or right which is secured to them. It is a general rule that at their pleasure all irregularities and defects may be waived." (*Clark v. Montague*, 1 Gray, 448, 449.)

It would follow that Howell and McDaniel are now administrators of right.

LORD, J., did not sit in this case.

[Filed March 24, 1885.]

CHARLES F SPECHT v. WM. O. ALLEN.

PRACTICE—JUDGMENT NON-OBSTANTE—APPEAL.—When it is claimed that a pleading does not state a cause of action or defense, as the case may be, and such objection is not raised till the trial, the party so objecting should be compelled to resort to a motion for judgment, notwithstanding the verdict, in case one were rendered against him, as the party interposing the pleading ought, when it has not been demurred to, to be entitled to the presumptions such a verdict would afford; but where the pleading is so defective that no valid judgment could be rendered upon it, and judgment has gone against the party filing such pleading, this court will not reverse such judgment because a different course was adopted.

PLEADING—FRAUDULENT REPRESENTATIONS.—In a defense upon the ground of fraudulent representations, it is not sufficient to aver that the representations were false, but the pleader must show wherein they were false. In such cases, facts, not conclusions, must be alleged.

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12	117
87	886
12	117
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12	117
42	61

Argument for Respondent.

MULTNOMAH COUNTY. Defendant appeals. Affirmed.

The facts are stated in the opinion.

Williams & Willis, and Mendenhall & Steeves, for Appellant.

This is an action for a deceit practiced by respondent upon the appellant in the sale of the land. It is not a question as to the extent of the deception practiced, but as to whether there was any known deception practiced by respondent inducing the purchase, and which resulted in damage to appellant. (*Rolfes v. Russell*, 5 Oreg. 400; *Addington v. Allen*, 11 Wend. 375; *Van Epps v. Harrison*, 5 Hill, 63; *Clark v. Baird*, 5 Seld. 183-186; *Monell v. Colden*, 13 Johns. 402.) The measure of damages is the difference in value between that which is actual and that which was represented to exist. (3 *Sutherland on Damages*, 590, n. 1; *Stiles v. White*, 11 Met. 358; *Morse v. Hutchins*, 102 Mass. 439; *Müller v. Barber*, 66 N. Y. 558-568; *Briggs v. Brushaber*, 43 Mich. 330-332; *Page v. Wells*, 37 Mich. 415-421.) The answer in this case is sufficient to entitle the defendant to show the difference in value between the property as it was represented to be and as it in fact was at the time of the purchase. (*Davis v. Elliott*, 15 Gray, 90.)

Northup, & Gilbert, for Respondent.

The rule is well settled that "the fraud alleged must be set forth particularly and in detail, so that the person against whom it is charged may have the opportunity of knowing what he has to meet, and of shaping his defense accordingly." (*Kerr on Fraud*, 365; *Conway v. Ellison*, 14 Ark. 360; *Capuro v. Builders' Ins. Co.* 39 Cal. 123; *Curry v. Keyser*, 30 Ind. 214.) This is the rule in all the Code States except Missouri. (*Bliss on Code Pleading*, § 211.) The answer must show, "not only what the fraud was, but also its connection with the alleged damage, so that it may appear to the court whether the fraud and the damage sustain to each other the relation of cause and effect, or at least whether the one might have resulted directly from the other." (*Bigelow on Fraud*, 451; *Byard v. Holmes*,

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5 Vroom, 296; *Bartlett v. Blaine*, 83 Ill. 25.) The representation must be material. (Bigelow on Fraud, 7; *Masterton v. Beers*, 1 Sweeny, 406.) "A complaint (or answer setting up an affirmative defense) ought to contain such a statement of facts that the court alone, without the aid of a jury, draws a necessary conclusion that a cause of action exists in favor of the plaintiff." (*Rodi v. Rutgers' F. Ins. Co.* 6 Bosw. 23.) In a case where the fraud relied upon was the false statement that the defendant was owner of certain land, the court held that the complaint must allege as a matter of fact that he had no interest in the land. (*Seaborn v. Sutherland*, 17 Ark. 603; *Kinney v. Osborne*, 14 Cal. 112; *Slack v. McLagan*, 15 Ill. 242.) It may well be questioned whether the defendant could set up any counter-claim for alleged fraud in this case, after having denied that there is any indebtedness on the note or any consideration therefor. He had his option to affirm the contract and sue for damages, or to rescind the contract and sue to recover the purchase money. He sues for the purchase money, and attempts to avoid the contract. This he cannot do without first tendering a conveyance of the land back to the plaintiff. (Bigelow Fraud, 427; *Kinney v. Osborne*, *supra*; *Joest v. Williams*, 42 Ind. 565; *Seaborn v. Sutherland*, 17 Ark. 603; *Lemmon v. Hanley*, 28 Tex. 219; *McMurray v. Gifford*, 5 How. Pr. 14.)

THAYER, J.—This appeal is from a judgment recovered by the respondent against the appellant in an action upon a promissory note, alleged in the complaint to have been executed by the appellant to the respondent on the 21st day of March, 1883, at Portland, Oregon, for the payment of \$3,250, and interest and reasonable attorney's fees, upon which he claims a balance of the sum of \$1,600, for which he demanded judgment, with accruing interest and costs, including such attorney fee as the court should adjudge reasonable. The appellant filed an answer to the complaint, denying any indebtedness, and in which he set forth, as a further defense and counter-claim, that he bargained with the respondent for the purchase of certain real property, situated in the county of Columbia, State of Oregon, opposite

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to the town of Kalama, in Washington Territory, claimed to be owned by the respondent; that upon proposing to purchase said land, and as a part of the consideration for such purchase, he requested the respondent to point out to him the exterior boundaries of the said land, which the latter agreed to do, and took him upon a part of the land and pointed out as the exterior boundary, upon the westerly side, a line which would include a certain stream of water, known as "Tide Creek," from its mouth extending back for a distance of about a third of a mile; that he pointed out as another exterior boundary a line or direction which would include a portion of the lower end of Deer Island, in the Columbia River, also include a considerable tract of the shore or bank of said river, and land covered by shallow water contiguous thereto, amounting to about eight acres, and represented that the boundary line on the river side extended into said Columbia River to navigable water for sea-going vessels and large steam and ferry boats; that in order to induce the appellant to purchase said land, the respondent further represented to him and declared that the water along the front of said land, at its boundary line, was of navigable depth at all seasons for large sea-going vessels; that a ship could lay anywhere from the foot of Deer Island along the boundary line of the land to the corner near the mouth of Tide Creek; that there was twenty-four feet and upwards of water anywhere from the Oregon shore to the Washington Territory shore at low water; and further represented, to induce him to purchase the land, that it was the only place where there was a sufficient depth of water in the Columbia River, extending across the river, where the Northern Pacific Railroad Company could ply their railroad ferry; that appellant, relying upon the honesty of the respondent, and the truthfulness of said representations made by him, was induced to purchase said tract of land at a very high figure, and at a price and cost far above its actual value, paying for three quarters of 408 acres the sum of \$15,000, while in truth and fact said land was wholly worthless; that relying upon the truthfulness of said declarations, representations, and statements of the respondent, appellant

• purchased said land for a town site; that it was wholly unfit for a town site, and worthless for that purpose; that each and every of the said representations, declarations, and statements were false, and the respondent knew them to be so when he made them, and that they were made by him with the intention and for the purpose of inducing the appellant to purchase the land at the said price; that the said promissory note was given for the purchase price of said land; that appellant did not discover the falsity of the said statements, representations, or declarations until sometime after the date of the last payment made upon the said note, and wherein the appellant claimed that he had been damaged thereby in the sum of \$15,000.

The respondent filed a reply to the said matter of defense and counter-claims set forth in the answer, in which he denied the same, and alleged that the appellant well knew the boundary lines of said land when he purchased it, and knew that they included the land he purchased, and the situation and condition of the land. The action was tried by a jury. At the trial the respondent gave evidence tending to show the value of the attorney fee claimed in the complaint, and rested his case. Thereupon the appellant offered himself as a witness to prove the matters alleged in his answer, to which the respondent's counsel objected, upon the grounds that they did not constitute a defense or counter-claim. The court sustained the objection, and excluded any proof thereof, to which the appellant excepted. The case having been submitted to the jury, they returned a verdict for the respondent for the amount claimed in the complaint, and upon which the said judgment appealed from was entered.

The only question presented for the determination of this court is whether the new matter contained in the said answer constituted a defense or counter-claim. It was an unusual method of taking advantage of such a defect, and the respondent should be held to strict rules. He should be required to show conclusively that the answer is absolutely defective, for the courts ought not to indulge a party in treating such a pleading as sufficient whereby costs and expenses in the action accum-

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ulate, and then to take advantage of the defect. (*Jennison v. Haire*, 29 Mich. 210, 211.) It has been held that when a pleading did not contain a cause of action or defense, as the case might be, and the objection to it was made for the first time at the trial by opposing the introduction of evidence to support it, the party would be deemed to have waived any objection to its sufficiency. (Pom. Rem. §§ 596, 597.) I am of the opinion that the party in such case should be compelled to resort to a motion for judgment notwithstanding the verdict, in case one were to be rendered against him, as the party interposing the pleading ought, when it had not been demurred to, to be entitled to the presumptions a verdict in his favor would afford. That appears to me to be the course the Code intends should be pursued. (§ 263, Code.) But on the other hand, where a party has no sufficient pleading to stand upon, and judgment has gone against him, he is not in a favorable condition to ask for its reversal, particularly where a verdict would not have cured the defect. An appellate court, in such a case, could, I think, consistently determine that the error had not injured him.

It seems to me that the question for this court to solve in this case is whether the appellant's answer was so defective that a verdict in his favor would not have aided it. If in such a case a court would arrest the judgment in consequence of the insufficiency of the pleading, the party standing upon it would have no right to complain on account of the mode of practice the court pursued in determining its insufficiency, as he would be in no condition to claim any benefit from such a pleading. The appellant, in his answer herein, alleged a great number of acts and representations of the respondent regarding the land he purchased of him, which, if untrue in any material particulars, would have been fraudulent, and would have constituted a counter-claim to the respondent's action; but he does not show, by any fact he alleged, wherein they were untrue. He alleges, it is true, that the whole matter was a tissue of falsehood, but in what respect he wholly fails to disclose; for instance, that the respondent pointed out to him where and what course certain of the exterior lines of the land ran, and that it was false; but he

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does not allege where and what course they did in fact run. If he had alleged the latter facts, it might, as the respondent's counsel suggested upon the argument, have shown that the difference was immaterial; and the same may be said of every one of his allegations of the pretended fraudulent statements of the respondent in the premises. Fraud in such a case consists in knowingly misrepresenting a fact in some material particular, and it must be so alleged that the court can see from the allegations that such misrepresentation had been made by the party charged. It would not be sufficient to create a liability to allege that the respondent, in order to induce the appellant to enter into the bargain referred to in said answer, fraudulently stated and represented that "there was twenty-four feet and upwards of water anywhere from the Oregon shore to the Washington Territory shore at low water," without an allegation of the true depth of the water between the two points, and showing that there was a material difference between the representation and the fact as it actually existed. It is not enough for the pleader in such a case to aver that the representation was false, but he must show wherein it was false, in order that the court may see that the discrepancy is material. An allegation of its being material would only be a conclusion and not a fact. Facts, in such cases, must be alleged, not conclusions; for it is the former that constitute a cause of action or defense.

Our opinion, therefore, is that the new matter set up in the answer was insufficient to constitute a defense or counter-claim; that it would have been held bad on demurrer, or motion in arrest of judgment; and that the refusal of the Circuit Court to allow evidence to be given in support of it was not such an error as would justify a reversal of the judgment, whatever might have been the correct mode of proceeding in such a case.

The judgment appealed from is affirmed.

Argument for Appellant.

{Filed March 25, 1885.}

M. A. HACKETT v. THE MULTNOMAH RAILWAY COMPANY.

AND

THE MULTNOMAH RAILWAY COMPANY v. M. A. HACKETT AND NATHAN HACKETT.

FERRY LICENSE—ASSIGNABILITY.—Whether a ferry license is assignable without the consent of the granting power, *quere.*

CORPORATION—PARTNERSHIP—AGENCY.—The principle which prevents a corporation from being a partner with another corporation, or a natural person, is that in a partnership the act of one partner binds the firm, while a corporation can only be bound by the acts of its officers.

ID.—COTENANCY IN A FRANCHISE—ACCOUNTING.—A corporation may be a joint owner of a ferry where not inconsistent with its constitution, and as such, entitled to share in its earnings, and to that end may have an accounting.

MULTNOMAH COUNTY. M. A. and Nathan Hackett appeal. Affirmed except as to the order dissolving the partnership, which is here held not to have existed.

The facts so far as material are stated in the opinion.

James G. Chapman, and *E. D. Shattuck*, for Appellant.

Survivorship in personal property has not been abolished in this State. (Code, § 9, p. 516, and § 38, p. 589.) The question of assignability or non-assignability of a ferry license under our statute is one of legislative intent. Nothing is to be deemed by implication to have been granted. (Sedgwick Stats. and Const. Con. 338, 339, n.; Cooley Const. Lim. 396.) Where a corporation has granted to it by charter a *franchise* intended in a large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which undertakes without the consent of the State to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the State, and is void as against public policy." (*Thomas v. R. R.* 101 U. S. 83.) The authorities cited in 45 Mich. do not sustain the proposition that a ferry license is assignable. In every one of

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Argument for Respondent.

them where the question is raised at all the contrary doctrine is recognized, unless by statute, as in Kentucky. *Blackwell v. Wiswall*, 24 Barb. 356 (affirmed at the Albany general term, March, 1857), and *Norton v. Wiswall*, 26 Barb. 618, cite and comment upon *Felton v. Deall*, 22 Vt. 170, and *Ladd v. Chotard*, Minor, 366, both cited in Mich. case, with numerous others, show that in an action for a tort the title to the ferry is not involved, and the question of assignability does not arise. *Rowman v. Wathen*, 2 McLean, 276, has been overruled by our Supreme Court in *Gant v. Drew*, 1 Oreg. 36. It was based upon the erroneous assumption that the ferry franchise issued out of and was a part of the realty adjoining the stream. In *Benson v. Mayor*, 10 Barb. 223, the only question was, whether several acts of the legislature conferred upon the City of New York only the power to regulate certain ferries, or gave to the city a title of private ownership in the ferries. In *Dundy v. Chambers*, 23 Ill. 370, the statute having made the ferry right appurtenant to the soil, the court held that a deed was necessary to pass the title. The language of section 53, page 733, of the Code is so positive and direct a prohibition against anyone but the licensee operating the ferry that no room is left for conjecture as to what the legislative intent is. (*Blackwell v. Wiswall*, *supra*.) A corporation cannot form a partnership. (*Angell & Ames Corp.* § 272; *Parsons Part.* 29; *Marine Bank of Chicago*, v. *Ogden*, 29 Ill. 248; *Whittenton Mills v. Upton*, 10 Gray, 597-600.)

C. B. Bellinger, J. M. Gearin, and P. L. Willis, for Respondent.

The ferry was operated with the understanding by all the parties that the respondent was to pay two thirds of the expenses, and receive two thirds of the profits, if any, while the appellants were each to pay one sixth of the expenses, and receive one sixth of the profits. Such an agreement constitutes a partnership. (1 *Parsons Cont.* 5th ed. 147.) If part owners, not partners, fit out and equip a vessel for a common venture they thereby become partners. (*Desty Shipping and Admir-*

alty, § 32.) That a ferry franchise may, as against all parties, except the public, be sold, assigned, and transferred, has, we think, been settled by authority. (*Hackett v. Wilson*, 12 Oreg. 3, and cases cited; *Crolley v. Minnesota & S. P. R. R. Co.* 30 Minn. 541.) The County Court of Multnomah County, which originally granted this license, assented to the assignment to the respondent, by accepting respondent's bond as such assignee, and thereby the assignment became valid as against everybody. (*People v. Duncan*, 41 Cal. 508.) But even if the franchise were not assignable, or had not been assigned, there can be no reasonable question on the facts in the case, that the original licensees sold and assigned a two-thirds interest in the profits and emoluments of the ferry business, and that they had full right and power so to do. It has been held in cases of offices, wherein the franchise or office could *not* be assigned, that the emoluments or fees arising therefrom, or a part thereof, or interest therein, *might* be assigned. (High Receivers, § 22.)

LORD, J.—This case consists of two suits consolidated and heard as one in the court below, one of which was commenced by M. A. Hackett against the Multnomah Railway Company, J. H. Foster, and J. H. Moore, in which M. A. Hackett claims to be the sole owner of the property known as the "Albina Ferry," a ferry plying on the Willamette River between Portland and Albina, and asks that said company, and Moore and Foster, be restrained and enjoined from interfering with M. A. Hackett in the use of said ferry property, and that they account to him for tolls he alleged that they had received therefrom. Moore and Foster, claiming no interest in the property, made default, and the Multnomah Railway Company answered, claiming a two-thirds interest in the property, and asking the appointment of a receiver. The other suit was commenced by the Multnomah Railway Company against M. A. Hackett and Nathan Hackett, in which the company claims that it is the owner of two thirds of said ferry property, and that said Hacketts are each owner of one sixth thereof, and asks that the Hacketts be restrained from interfering with it in the

exercise of its rights as such owners. Nathan Hackett answered, disclaiming any interest, and M. A. Hackett answered, claiming the whole. In October, 1880, the ferry license was granted by the county court to M. A. Hackett and Norman Finch for the period of five years; subsequently the Multnomah Railway Company succeeded, by mesne conveyances, to two-thirds interest in the ferry; and from the time of such purchase until the present suits were instituted, M. A. Hackett (and in the same way Nathan Hackett) and the Multnomah Railway Company have operated the ferry by virtue of their joint proprietorship in the premises. The conclusions of fact and law, as found and determined by the court below, were against Hackett and in favor of the Multnomah Railway Company and hence this appeal by M. A. Hackett.

The counsel for the appellant contends that the principle to be determined is, whether a ferry license is assignable. His theory is that a ferry license is a special privilege conferred by the government on individuals, and which does not belong to the citizens generally of common right; and that therefore it is a personal trust reposed in the licensee, which is not assignable without the consent of the granting power. In *Hackett v. Wilson, ante*, we took occasion, under circumstances which reference to that opinion will explain, to review the authorities upon this subject; but this question was not determined, nor intended to be determined in that case. Speaking only for myself, as the writer of that opinion, I confess the impression strongly prevailed with me that a ferry license, as provided by our statute, is a personal trust reposed in the grantee, and is not assignable, by voluntary conveyance or otherwise, without the consent of the granting power. But for the purposes of this case, conceding this to be true, it is not perceived how it can avail the appellant, under the facts disclosed by the record. The county court from where the license was originally derived has assented to the assignment, and accepted the bonds of the respondent as such assignee; and thus it would seem the consent of the granting power has been obtained, and the objection to the validity of the transfer obviated. In *People v. Duncan*, 41 Cal. 511, the court say:—

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“Waiving any opinion on the point whether a franchise is properly exempt from execution, in the sense of section 14 of the bankrupt law of the United States, and which, for that reason, would not pass to the assignee, it is obvious that if it is a personal trust, not assignable without the consent of the granting power, the assignee in bankruptcy does not acquire it by virtue of the assignment. He can take nothing which the bankrupt could not voluntarily assign, unless it be property previously conveyed to him in fraud of creditors or of the law. I am therefore of the opinion that the title of Jenkins did not pass to the assignee in bankruptcy. If this were the whole case, the defendant would be without title; but it appears from the finding that after the conveyance from the assignee to the defendant (Duncan) Jenkins acquiesced in the transfer, and not only relinquished all his title, but delivered the possession of the road and its appurtenances to Duncan. Subsequently the board of supervisors (from whom the franchise was originally obtained) not only assented to the transfer, but authorized Duncan to collect the tolls. Under the authorities already cited, this must be deemed a valid transfer of the franchise by Jenkins, with the consent of the granting power from whom it was originally derived.”

The evidence shows that the right of the respondent in the ferry and its appurtenances after the transfer was made, was acquiesced in and recognized by the appellant; that for the purpose of successfully operating the ferry, the company managed the business; that the appellant and the other Hackett, who claimed some sort of interest, accepted employment from, and the wages fixed by, the company; that they turned over the gross earnings in the capacity of employees to the company, and that the company, being intrusted with the management, paid all expenses, including the wages, and accounted to such owners for their share of the rents and profits. The rights of the company being thus recognized under the transfer, and the assent of the granting power having been obtained, *People v. Duncan* is decisive of the question here raised.

The next question is one which presents more difficulty, and relates to the allegation of partnership set up by the respondent

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in the answer to the first suit, denied by the Hacketts, but found to exist by the court below. The ferry license was originally granted to M. A. Hackett and Norman Finch; subsequently they transferred one third of each of their interests in the ferry to M. F. Mulkey, and they built the steam ferry boat Albina, and started the ferry. The evidence shows that these parties entered into written articles of copartnership, for the purpose of operating the ferry, in which it was provided that Hackett should be paid a certain sum monthly for his services in operating the boat, in addition to his share in the profits, after deducting expenses and losses, as a copartner. It would seem, after the transfer to the respondent, that they carried on the business together in accordance with their partnership agreement. There is nothing to indicate that it was formally adopted; but the management of the business and the conduct of the parties are consistent with that understanding. At least, the ferry was operated by the parties with the understanding that the respondent was to pay two thirds of the expenses of the business, and receive two thirds of the profits, and each of the Hacketts was to pay one sixth of the expenses, and receive one sixth of the profits; or one third, in this ratio, belonged to the Hacketts, without reference to any understanding existing in regard to it as between themselves. But certainly, if any partnership existed, as found by the court, it ought to have been dissolved.

It is apprehended, however, that the court below, in reaching the ultimate result, was less affected by mere technical rules than those general principles of equity adapted to the particular features of the case, and calculated to determine rightfully and justly the relations of the parties and their rights and interests in the premises. As we view it, it is immaterial whether the relation of partnership or that of simply co-ownership existed between the parties. The fact of ownership, and the rights of ownership, do not depend upon the relation of partnership between the parties. The relation of partnership arises out of contract between the parties, while a joint ownership in property may be created where there is no contractual relations. The objection to a part-

nership between a corporation and a natural person rests wholly upon the fact that, while in an ordinary partnership the act of one partner binds the other, yet, under the laws authorizing the formation of corporations, the latter can only be bound by the acts of its officers, and can only use its funds for the objects prescribed in the articles. "There is no general principle of law," says Mr. Lindley, "which prevents a corporation from being a partner with another corporation or with ordinary individuals, except the principle that a corporation cannot lawfully employ its funds for purposes not authorized by its constitution." (Lindl. Partn. 86.) But the court below may have proceeded upon the hypothesis that this objection would be obviated, or, at least, would not apply when there is a mere communion of interests in the profits of the business. There may be a partnership in the profits of a business, although one party is the sole owner of the goods and the other the sole manager of them. The capital may consist in the mere use of the property owned by the individual partners separately. (Colly. Partn. § 17, n.)

The respondent, having assumed the management of the business, and to be the managing owner of the property, and finding that there was nothing inconsistent in this with its charter powers, the court evidently assumed that the relation of communion of interest in the earnings of the business was not inconsistent with the purposes for which the company was formed, nor with the exclusive power of the proper officers of the corporation to manage its affairs; and being tenants in common of the ferry property, that they might be partners in the profits of the ferry. This was consistent with the previous dealings and conduct of the parties under the old agreement and since the transfer, and would apply a just and equitable principle to the new agreement and settlement of their business. Assuming, however, that there was no partnership, it is clear that it was competent for the parties to become co-owners in the ferry (under the circumstances already indicated), and as such to be entitled to share in its earnings; and that upon the exclusion of one by the other, a receiver would be appointed and an accounting had.

A receiver will be appointed of a steamboat when the owners dispute. (Edw. Rec. 331.)

The obligation of a partner to account with his copartner arises *ex contractu*. The obligation of a co-owner to account with the others for the profits which may have arisen from the common property cannot be based upon contract when no contract has been entered into, but it by no means follows, because there is no contract, express or tacit, to share profits, each co-owner ought to be entitled to get what he can, and to keep what he may get. This, it is said, was plainly enough seen by the Roman lawyers, who properly held an obligation to arise *quasi ex contractu*, and who found no difficulty in declaring that every co-owner ought to account to the others for the profits received by him, and contribute with them to the expenses properly incurred for the common benefit. So that it would seem, whether the relation of partners or co-owners exists, the rights of the parties are the same, at least so far as concerns the common property as such; and a co-owner, equally with a partner, may have an accounting and a receiver appointed.

In *De Witt v. San Francisco*, 2 Cal. 289, the court say:—

“The books do not afford an instance in which the right to hold as tenants in common, either with themselves or natural persons, is denied to corporations.” “A tenancy in common may exist in every species of property, real, personal, or mixed. Two or more persons may, therefore, be tenants in common of a fixture, or of the right to use or convey water in a ditch. . . . So, too, a franchise may be held by two or more persons as tenants in common.” (Freem. Cotenancy, § 88.)

In *Haven v. Mehlgarten*, 19 Ill. 91, it was held that “where several persons were authorized to establish and maintain a ferry, such persons were tenants in common of the land, of the franchise granted, and of the vessels and machinery by means of which these franchises, or one of them, is to be exercised and employed, and their contract with the public be performed” (see p. 95); and the court also say: “There is a concurrent jurisdiction in law and equity; and the plaintiff might have resorted to either.” (Page 97.) The right of tenants in com-

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mon to share in the profits of the common property, and resort to a court of equity for an accounting and a receiver in the case of exclusion by one tenant of another, would seem from the necessity of the case and obvious principles of justice to be authorized. "A court of equity has jurisdiction to appoint a receiver, at the instance of one tenant in common, against his cotenants, who are in the possession of undivided valuable property, receiving the whole of the rents and profits and excluding their companions from the receipt of any portion thereof, when such tenants are insolvent." (Freem. Cotenancy, § 327, citing *Williams v. Jenkins*, 11 Ga. 598.)

All these required facts appear in the case: the value of the property; in what such value consists; the exclusion and the insolvency of the parties in possession. As already stated, the company had the management of the ferry, and such management was acquiesced in and recognized by the joint owners. They accepted employment in the business at the hands of the company, and their compensation was fixed by the company. The gross earnings were turned over by them, in their capacity as employees, to the company. All expenses, including wages of such owners, were paid by the company, and the latter accounted to such owners for their share of the rents and profits. To this status of things thus existing the appellant, notwithstanding he had participated in the original transfer, and those subsequently made, as well as the possession of the respondent, and notwithstanding the large price paid in good faith, and the heavy expense incurred and laid out in improving and rendering the property more valuable and profitable, seems to have conceived the idea that he could appropriate the whole of the property, or that it reverted to him by reason of the invalidity of the transfer of the franchise. Upon the question of the account, the evidence has been carefully examined, and I am unable to detect any error in the result reached. My colleague, JUDGE THAYER, who sat with me in this case, after a patient and careful examination of the evidence, has reported a similar result. The causes were tried below by an able and experienced judge, and the result he reached meets our approval.

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From what has been indicated, it follows that there is no necessity for an order of dissolution, as no partnership is found to exist. The court below is also directed to make an order for the receiver to report, and to discharge him if deemed proper under the circumstances of the case. In all other respects the decree must be affirmed.

WALDO, C. J., did not sit in this case.

[Filed March 25, 1885.]

THE STATE OF OREGON v. R. D. HUME.

CRIMINAL LAW—INDICTMENT—HIGHWAY.—In an indictment for obstructing a highway, it is not necessary to set out the *termini*. It is sufficient to set out in a compendious way that it is a highway. *Aliter* in pleading a private way.

Id.—TERMINI.—If the *termini* be stated, they must ordinarily be proved. But when a local description, sufficient to fix the precise point of obstruction, is given as well as the *termini*, the latter may be disregarded on proof of a highway at the place of obstruction.

CURRY COUNTY. Defendant appeals. Affirmed.

William R. Willis, for Appellant.

This indictment is for obstructing a public highway running from the southern boundary of Curry County to Port Orford, and defendant cannot be convicted for obstructing a strip of land in front of the town of Ellensburg, set apart by the owner for public use. (Angell Highways, § 276; *Rez. v. St. Weonards*, 6 Car. & P. 582; *State v. Purify*, 86 N. C. 681; *White v. Bradley*, 66 Me. 254-260.)

J. W. Hamilton, District Attorney, and *J. M. Siglin*, for Respondent.

WALDO, C. J.—There is a difference between pleading a public and private way. In the former case it is not necessary to set out the *termini*; in the latter, both must be set out with certainty. (Taunton, J., in *Simpson v. Leathwaite*, 3 Barn. & Adol. 226.) In pleading a highway it is sufficient to set forth in a compendious way that it is a highway, without setting

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forth when it became a highway. (*Aspidall v. Brown*, 3 Term Rep. 266.) But if the *termini* be stated, they must be proved, because they become descriptive of the identity of the highway described. (*State v. Noble*, 15 Me. 476; *Hill v. State*, 41 Tex. 253; *Rex v. Inhabitants of St. Weonards*, 6 Car. & P. 582.) "When, however, a local description sufficient to identify and fix the precise point of obstruction is given, as well as the *termini*, the latter may be disregarded, and proof that a road existed at the place of obstruction is alone necessary." (*Lewiston v. Proctor*, 27 Ill. 419; *Dimon v. People*, 17 Ill. 421; *Houston v. People*, 63 Ill. 186.)

The indictment in this case contains such a local description in the allegation "that there is a strip of land lying in front of said town of Ellensburg, as appears from a plat of said town recorded in the office of the county clerk of said Curry County, and along the navigable waters of Rogue River, which forms a part of said highway, and which said strip of land lying in front of said town, and along the navigable waters of Rogue River as aforesaid, now is, and for more than twenty years prior to said 1st day of May, A. D. 1874, had been, a public highway and public landing, over which all persons had been accustomed to pass and repass at pleasure; that on the 1st day of May, 1884, in the county aforesaid, the said R. D. Hume did wrongfully obstruct the public highway aforesaid, where the same passed in front of the town of Ellensburg aforesaid, and along the navigable waters of said Rogue River as aforesaid, by then and there erecting," etc.

No exceptions were taken to any charge of the court on any issue on the material part of the indictment. The errors that intervened, if any they were, were wholly immaterial to the issue. The judgment must be affirmed.

Argument for Appellants.

[Filed March 27, 1885.]

S. J. TATUM AND H. L. BOWEN v. C. C. CHERRY
AND H. L. PARKES.

MECHANICS' LIENS—CONSTRUCTION OF STATUTE.—Under section 15 of the Act of October 28, 1874, providing for mechanics' liens, where there is no written contract, the right to a lien attaches only in case the person erecting the building refuses to furnish a memorandum in writing of the terms of the contract for its construction.

IN.—The lien law was not designed to give machinists and others a lien for work done and material furnished in the ordinary course of business. The person claiming a lien must be a contractor, must have either built or repaired a structure in some definite particular. An entire transaction must have been contemplated by the parties at the outset.

LINN COUNTY. Plaintiffs appeal. Decree modified.

The facts are stated in the opinion.

Weatherford & Blackburn, for Appellants.

To entitle one to a lien it must be shown affirmatively that the machinery repaired or altered is of such a nature or character that it becomes a part of the realty. (*Baker v. Fessenden*, 71 Me. 292.) Nor is one supplying new machinery for an old mill entitled to a mechanic's lien on the building. (*Haslett v. Gillespie*, 95 Pa. St. 371.) When the manufacturer or machinist merely manufactures or sells materials for repairing machinery, or repairs detached parts thereof, but has nothing to do with uniting the materials to the machinery, he obtains no lien. (*Loudon v. Coleman*, 59 Ga. 653.) It is only those that contribute directly, by their labor or materials furnished, in the construction of a building or in the repairs of the same, that are entitled to a lien. (*McCormick v. Los Angeles W. Co.* 40 Cal. 185.) Taking a promissory note waives any lien the respondents may have had. (*Crooks v. Finney*, 39 Ohio St. 57; *Schulenburg v. Robinson*, 5 Mo. App. 561; *McMaster v. Merrick*, 41 Mich. 505.) A mechanic's lien cannot be enforced against lands of which there is no written identification in the agreement for the work. (*Hammond v. Wells*, 45 Mich. 11.) A party desiring to enforce a mechanic's lien must show a strict compliance with every

Argument for Respondents.

requirement of the statute. (*Farmers' Bank v Winslow*, 3 Minn. 86; *Rugg v. Hoover*, 28 Minn. 404.)

Flinn & Chamberlain, for Respondents Cherry and Parkes.

Sections 1, 2, 3, and 15 of "an act to provide for liens of mechanics, laborers, material men and others" (Laws 1874, p. 104) provide who may acquire such a lien as is therein provided for, upon what property the lien may be acquired, and what priority and effect shall be given to it. A lien arises under the act when the contractor agrees to construct such a building as the employer might thereafter wish constructed, or to make such alteration or repairs as might be required, or to furnish such materials as might be necessary. (*Choteau v. Thompson*, 2 Ohio St. 114.) Contracts similar to the one set up by respondents in this case have been construed to be one entire transaction. (*Choteau v. Thompson*, *supra*; *Milner v. Norris*, 13 Minn. 455; *Tompkins v. Horton*, 25 N. J. Eq. 284; *Skyrme v. Occidental Mill*, 8 Nev. 220.) Where materials are furnished from time to time, for a particular purpose, and the dates are so near each other as to constitute one running account, the lien dates from the time when the first article was supplied, or the first labor performed. (*Beckel v. Petticrew*, 6 Ohio St. 247; *Skyrme v. Occidental Mill*, 8 Nev. 220; *Capron v. Straut*, 11 Nev. 304; *Preston v. Sonora Lodge*, 39 Cal. 116; *Choteau v. Thompson*, 2 Ohio St. 114; *Tibbetts v. Moore*, 23 Cal. 208; *Barber v. Reynolds*, 44 Cal. 519; *Kendall v. McFarland*, 4 Oreg. 292.) The contract referred to in section 1 and section 15, Laws of 1874, may be written or oral, express or implied. (*Dalles Lumber and Manufacturing Co. v. Wasco Woolen Manufacturing Co.* 3 Oreg. 531.) It is objected that the description of the property by respondents, on which they claim to hold their lien, is not sufficient. It is substantially the same as that under which appellants claim a lien in their complaint, and they cannot with reason say it is sufficient for appellants, but not for respondents. But the description is sufficient in itself. (*Hotaling v. Cronise*, 2 Cal. 60; *Hartner v. Conrad*, 12 Serg. & R. 301; *Springer v. Keyser*, 6 Whart. 187; *Tibbetts v. Moore*, 23 Cal. 208.)

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THAYER, J.—This appeal is from a decree rendered in a suit to foreclose a chattel mortgage executed by the respondents Smith and Owens to the appellants, December 15, 1883, upon certain leasehold premises situated in Linn County, to secure the payment of certain promissory notes owing by said Smith and Owens to appellants, amounting to the aggregate sum of \$5,000. Said premises included a certain saw-mill that had theretofore been purchased by said former parties of the appellants. The respondents Cherry and Parkes were made defendants in said suit, upon the grounds that they had, or claimed, some interest in the said premises which the appellants sought to foreclose. Cherry and Parkes filed an answer, in which they set forth the nature of their interest in the said premises, which they alleged to be a mechanic's lien upon the said property for the sum of \$1,300, arising out of a claim for work done and materials furnished by them to the said Smith and Owens to repair the said mill. It was alleged in the said answer that the said Cherry and Parkes, at the special instance and request of the said Smith and Owens, did, between the 5th day of November, 1883, and the 23d day of February, 1884, build and construct for them one ten-horse-power engine, and place the same in said saw-mill, and did repair and alter one planer, and place the same in said mill, and furnished other labor and material in constructing, repairing, and altering said saw-mill, and the machinery therein, as per bill of items attached to said answer and marked Exhibit A, for all of which they (said Smith and Owens) promised and agreed to pay them (said Cherry and Parkes) said \$1,300, after deducting all credits and offsets, and executed to them a promissory note, as evidence thereof, bearing date February 26, 1884, due thirty days thereafter.

It is alleged in the answer, also, that Cherry and Parkes commenced to furnish said labor, machinery, and material to said Smith and Owens for the construction and repair of said saw-mill, and the machinery therein, on the 6th day of November, 1883, and continued to furnish the same until the 22d day of February, 1884, at which time said alterations were completed; that on the 22d day of March, 1884, they filed in the office of

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the county clerk for said Linn County an account of said indebtedness, duly verified by them, with a description of the said mill premises, by which they claimed to have obtained a lien thereon, and upon the fixtures belonging thereto, from said 6th day of November, 1883; and that it had priority over the appellants' lien by virtue of the said chattel mortgage.

The appellants filed a reply to the answer, denying the allegations contained therein, and the issues so joined constitute the main question in the controversy between the parties. The Circuit Court decreed that there was due from Smith and Owens to Cherry and Parkes the amount claimed by them in their answer; that it was a lien upon the said mortgaged premises under and by virtue of the act of the legislative assembly of this State providing for the liens of mechanics, etc., and the manner of their enforcement, approved October 28, 1874, and that the said lien had priority over the said mortgage. The appellants' counsel claims that so much of said decree as affects the rights of the appellants is erroneous.

The question in the case which is referred to this court for determination depends wholly upon the facts and circumstances under which the work was done, and the material furnished by said Cherry and Parkes to said Smith and Owens, alleged in the answer, and the construction of the said mechanic's lien law. A number of authorities are cited in the respondents' brief, and many of them were referred to upon the argument, and the appellants' counsel also cited several. But the authorities, as a general thing, are of very little importance in this case. They may serve to show how mechanics' lien laws of other States have been construed; but that is of no great consequence, from the fact that the laws of this State upon that subject have, for the past ten years, been a confused jumble. It will be seen, from an inspection of said Act of 1874, that an attempt was made to compile the California Act of 1862, relating to mechanics' liens, and evidently it was consummated by some legislative journeyman, instead of by the members of that body. If the cobbler who got it up had been sufficiently discreet to have copied the substance of the California act literally, it would have

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been reasonably acceptable. But the vanity peculiar to novices induced him to change its terms, and to inject into it original ideas of his own. That effort displaced the lion's skin, and exposed the pretender underneath. Some of the sections of said Act of 1874 were copied word for word from the California act. They are plain, and easily understood; but others were mere distortions. Section 15, under which the respondents claim to have acquired the lien herein, which evidently was taken from section 17 of the California act, is one of the unfortunate sections. The original section was wantonly mutilated in attempting to remodel it. The changes and interpolations to which it was subjected so botched it that it would require a *savant* to determine what it means. The section, as adopted by the California legislature, provided that whenever any person should proceed to erect any building, etc., without making any contract in writing for such construction, etc., every person who should perform labor or furnish material therefor should have a lien upon the interest of the person causing the same to be constructed, etc., and on the land for a convenient space around the same, or so much as might be required for the convenient use and occupation thereof, which lien should relate to the time of the commencement of the work, and be enforced in the same manner as other liens therein provided for. As adopted by the Oregon legislature it reads substantially the same until it comes down to the end of the sentence terminating with the words "without making a contract in writing"; but there the following is injected into it:—

"Or if the contract is oral, *who shall refuse*, when applied to by any subcontractor, artisan, etc., to furnish a memorandum in writing of the terms of such oral contract for such construction or repairs."

Then the words in the original are resumed. This amendment, so far as I can understand it, has changed the whole sense of the section. In the original, it was clearly intended that if a person proceeded to erect a building, without making any contract in writing for its construction, every person who should perform labor upon it, or furnish material to build it,

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would be entitled to claim a lien thereon. But as amended, the right to the lien attaches only in case the person who proceeds to erect the building refuses to furnish a memorandum in writing of the terms of the contract for its construction. The words in the amended portion, "who shall refuse," undoubtedly refer to the person who proceeds to erect the structure, and I cannot perceive that there is more than one alternative; although the word "or" is used after the word "writing," and before the words "if the contract is oral." As no new condition is introduced, the two phrases, "without making any contract in writing," and "if the contract is oral," import the same thing; and it is no matter if they do not; the words "who shall refuse" apply as much to one as to the other.

If this view is correct, then said section 15 has no application to said respondent's claim. They cannot invoke the aid of that section, whatever may be the true construction of the original section, in order to establish their right to their lien upon the property in question. The legislature of this State has by the amendment restricted it to that class of cases where there has been a contract for the construction of the building, or other structure upon which the lien is claimed, but which has not been reduced to writing, and the work been done and material furnished to the contractor. The lien then attaches to the building or structure. If a memorandum of the contract is refused, instead of being a liability against the owner for an unpaid portion of the contract price, as provided in other parts of said act, the result is that said respondents could claim no lien except under the first section of said act; and that, in order to establish it under that section, they are compelled to maintain that they made an original contract for the erection or repair in whole or in part of the said saw-mill. Supplying the proprietors from time to time with machinery, or mending their old machinery, would not ordinarily give them a lien upon the premises for the debt; more especially where it was ordered from their shop, and delivered to the proprietor by being put aboard the cars. If a mill owner were to order from a foundry a casting, or from a machinist a piece of machinery, the latter

could not claim a lien upon the premises, nor assuredly could such lien be claimed where some appliance was sent to the shop of the machinist for repair. We must, therefore, look into the evidence to ascertain whether the materials were furnished and the work done in pursuance of an entire contract between the said parties to construct or repair the mill in question in some specified particular, or whether, on the other hand, the materials were furnished as ordinary custom work is done, and the labor upon the mill performed in the same manner in which labor is commonly employed.

The exhibit annexed to the answer, and referred to as Exhibit A, contains a great number of items which appear to have been charged from time to time, evidently as the work and materials were ordered. The first charge is November 6, 1883. It is freight and drayage on planer, six dollars. The second charge is on the 20th of the same month. It is thirty-two feet three-fourths-inch pipe, four dollars and eighty cents, and several other articles, which appear to have been furnished on that day. The third is on the 27th of the same month, and includes several articles; and it continues along, several days usually intervening between the dates of the charges. At the end are credits amounting in the aggregate to fifty-eight dollars, but they are given under two dates, February 6, 1884, by 216 feet cedar lumber, six dollars and fifty cents; February 25, 1884, by three small pieces of machinery, and a difference on labor, and a deduction on a piece of machinery, making in all the balance.

The only evidence which appears to have been given as to the manner the work and materials were contracted for was the deposition of one of the respondents, Mr. Cherry. In answer to some of the interrogatories asked him, he said:—

“I was at Harrisburg and saw Mr. Smith; he told me he wanted some work done on his planer, and other work, and also wanted me to furnish some new machinery. I did so. There was no other contract.”

To another interrogatory he stated, in effect, that all said work and material entered into the construction of said saw-mill, and was necessary to its use, and formed a part of it. This

evidence, standing by itself, might be sufficient to warrant the deduction which seems to have been drawn by the Circuit Court, that the work was done and the material supplied under a general contract to repair the saw-mill, in which case a lien would probably have attached, as claimed by the said respondent. But other portions of the testimony of the said witness seems to negative such conclusions, as will be seen from the following questions asked him, and his answers thereto:—

“Question 44. These articles that you have mentioned as furnished to them in the first list you gave this morning in direct examination, they ordered them at the time you have specified, and you just simply forwarded them to them, and charged the usual price, did you not? Answer. We did. Q. 45. The work that you did on the journals and old pulleys were sent by Smith and Owens to your firm in Albany, and you did the work and repairs on them as specified in your bill of items furnished, and when finished delivered them to Smith and Owens at the shop or foundry in Albany? A. We did. Q. 46. And at each time you would charge them for the work done or machinery furnished? A. Yes. Q. 47. Was each of these articles that Smith and Owens purchased of you purchased separately, as charged in the bill? A. They were purchased just as the orders were sent in. Q. 48. And this statement given by you this morning, and alleged in your answer, is simply a running account between Cherry and Parkes and Smith and Owens from November, 1883, to February 22, 1884? A. Simply a running account up to the time the note was given. Q. 51. Your account or bill of items states substantially all the facts, as well as the contracts between your firm and that of Smith and Owens, does it not? A. It does.”

This testimony given by the respondent in his own behalf utterly precludes any inference that there was any contract or definite understanding in the outset in reference to furnishing the work and material, or that it was anything more than the performance of casual custom work. Smith doubtless did speak to Mr. Cherry about doing jobs of that character for Smith and Owens, and furnishing them new machinery; but it is very evi-

dent, from the testimony of Cherry, that it was only intended to be such work and machinery as they should from time to time order. Machinists, like other persons carrying on business, have their customers; but the lien law was not designed to give them a lien for work done and articles furnished in their usual course of business, any more than it was to give a lien in favor of grocers, tanners, or plumbers for articles supplied and work done in the ordinary course of trade or employment. There might, in such a case, be such a continuous account that it could be sued upon as an entire transaction; but it would lack the essential ligament which establishes such an entirety that the lien attaches from the beginning. The party who does the work or furnishes the material must be a contractor. He must undertake to do a job, either to build or repair a structure in some particular, and the work must have been done or the material furnished in pursuance thereof. It is the contract and the nature of the subject-matter thereof which give rise to such a lien. An entire transaction must have been contemplated by the parties in the outset. Such a lien is an extraordinary right; it relates back to the time of the commencement of the work or of furnishing the materials, has precedence over intervening claims specified in the act, and extends to the land upon which the structure is situated. It certainly was not intended to give such a preference in an ordinary business affair, or in any case, other than that of an undertaking upon the part of the mechanic or material man to build, add an improvement to, or repair, in some particular, the structure, or furnish material therefor. The case cited by the appellants' counsel of *Haslett v. Gillespie*, 95 Pa. St. 371, seems to sustain this view.

The decree of the Circuit Court will therefore be modified in the part thereof which gives a preference to said respondents' claim, except as to those articles not covered by the appellants' mortgage.

Argument for Respondents.

[Filed March 30, 1885.]

JOSEPH W. CARLON v. J. R. DIXON AND E. DIXON.

RECOVERY OF PERSONAL PROPERTY.—AFFIDAVIT FOR.—JURISDICTION.—In an action for the recovery of personal property, the affidavit prescribed in section 181 of the Civil Code is the foundation of jurisdiction to order an immediate delivery of the property.

ID.—JUSTICE'S COURT.—REPLEVIN BOND.—SURETIES, LIABILITY ON.—When such affidavit is sufficient in form and substance in an action in a Justice's Court, the fact that the direction to the sheriff indorsed thereon was signed by the plaintiff instead of by the justice will not exonerate the plaintiff's sureties from liability on their bond.

DOUGLAS COUNTY. Plaintiff appeals. Reversed.

The material facts are stated in the opinion.

C. Ball, for Appellant.

The bond is regular, and accomplished the object for which it was given. The makers cannot now object to their own process, and avoid their deed. (*Hicklin v. Nebraska City Bank*, 8 Neb. 463; *Cady v. Eggleston*, 11 Mass. 282; *Morse v. Hodsdon*, 5 Mass. 315; *Cook v. Boyd*, 16 Mon. B. 556; *Johnson v. Weatherwax*, 9 Kan. 75; *Wachstetter v. The State*, 42 Ind. 166, 168; *Ott v. The State*, 35 Ind. 365.) It is no objection that the defendant in replevin gave a redelivery bond; this did not dissolve the process. For all purposes the property remained in the possession of the court, and subject to its orders until final judgment. (*Hilton v. Ross*, 9 Neb. 406.)

William R. Willis, for Respondents.

In order to give the Justice's Court jurisdiction, and to create a liability on the makers of the undertaking sued on, the provisions of the Code, page 464, sections 12, 17, and pages 484, 485 (form of order and undertaking), should have been strictly complied with. The Code fixes and defines what shall be done to entitle a party to the remedy in Justice's Court in such an action. The provisions are jurisdictional and mandatory. (Page 464, §§ 12, 17.) In this case there was no affidavit filed

12 144
16 436
6* 500
18* 843

12 144
33 318

with or acted on by the justice. (*Castellanos v. Jones*, 5 N. Y. 164.) The bond in this case stands on the same ground as an appeal bond, without an order allowing an appeal when the statute requires such an order. Such a bond is void. (*Brandt Guaranty and Suretyship*, 541, § 404. And see *Jacoby v. Drew*, 11 Minn. 408, as to attachment.) The order is process, and if issued without the undertaking being taken by the justice it would be void; and the same as to the undertaking if made or taken without any order or process. (*Johnson v. Stilson*, 42 Mich. 541. See also *Purple v. Purple*, 5 Pick. 226.) Here the sheriff had no order or process, he had no right to take or approve the bond, he had no authority to take the property. The undertaking cannot be considered as taken or made according to or in compliance with the statute. It is therefore void. (*Benedict v. Bray*, 2 Cal. 251-255; *Thompson v. Lockwood*, 15 Johns. 256; *Buckingham v. Bailey*, 4 Smedes & M. 538; *Germond v. People*, 1 Hill, 343.) There should be some attestation of the undertaking by the justice, else it is void. (*Houglan v. State*, 43 Ind. 537.) In an action against the sureties on a replevin bond, it is necessary to allege that the property was delivered to the party for whom the bond was given. (*Nickerson v. Chatterton*, 7 Cal. 568.) So in a suit on a bail bond, the complaint must allege that the person bailed was released from custody. (*Los Angeles v. Babcock*, 45 Cal. 252.) The delivery of the property is the consideration for the undertaking. If there was no delivery then there is no liability. (*Green v. Kindy*, 43 Mich. 279; *Wells Replevin*, § 388.)

LORD, J. — One Britt brought an action in a Justice's Court against the plaintiff for the recovery of a certain horse. He filed the necessary affidavit, and gave the required bond, with the defendants as sureties, and by indorsement on the affidavit required and directed the sheriff to take the horse described in the affidavit from the plaintiff and to deliver it to him. Without further detail it is sufficient to state that the result of this action terminated adversely to Britt. An execution having been issued, it was returned by the officer *nulla bona*. This

action was then brought in the Circuit Court by the plaintiff against the defendants as sureties, upon such bond given in the Justice's Court for the claim and delivery of the property above referred to. The complaint sets forth all the facts in detail, was demurred to by the defendants, and sustained by the court. From the judgment thus rendered the plaintiff appeals.

The defendants object to the bond for the reason that the direction on the affidavit which accompanied it was signed by the plaintiff Britt in the replevin suit, instead of the justice. In an action for the recovery of personal property, where a delivery is claimed in other than a Justice's Court, the Code prescribes the indorsement upon the affidavit which the plaintiff may make. But when such action is brought in a Justice's Court, and a delivery of the property is claimed, the statute prescribes that "all affidavits, orders, and undertakings for such remedies are to be taken or made and filed with the justice, and such process is to be issued by and made returnable before him." (Justice's Code, Misc. Laws, § 12, p. 464.) And that "the undertaking for an order for the delivery of personal property claimed in the action shall be taken by the justice who makes the order," etc. (Justice's Code, Misc. Laws, § 17; and see form in appendix, Justice's Code, Misc. Laws, § 17, p. 484.)

It is essential in every case where the remedy of claim and delivery is sought, the proceedings being statutory, that every requisite prescribed must be strictly complied with. Anyone acquainted with the facts may make the affidavit. Our statute prescribes, in substance, what the affidavit shall contain, and it is not questioned that the statute was strictly complied with in this particular, and the affidavit in form and substance sufficient. The proceeding is auxiliary in its nature, and the principle applied to such affidavits is similar to that applied in affidavits for attachment. The affidavit is the foundation of jurisdiction in such proceeding, and when it complies with the statutory requirements, and is filed, the jurisdiction attaches, and the court is authorized to act and make its order. The principle is elementary that whatever is done after jurisdiction has been acquired, although it may be erroneous, is not void.

When the required affidavit has been given, a defect or informality in the order for the delivery of the property will not touch or vitiate the jurisdiction. Such order, whether properly or improperly made, flows from the exercise of jurisdiction. It depends upon the sufficiency of the affidavit, which is a prerequisite to its issuance. (Wells Replevin, §§ 650, 651, and notes.) Being based upon the affidavit, and that admitted to be sufficient, a defect or irregularity in its issuance will not render such proceeding void. The effect in such case is simply to produce an error of which the adverse party may take advantage. When, therefore, Britt made the necessary affidavit and gave the required bond, and the officer acted upon his indorsements upon the affidavit, took the property from the possession of the plaintiff, and delivered it to him, neither he nor they will be permitted to object to the informality of such order to escape liability after the benefit of it has been enjoyed. Whether the direction was signed by him or the justice did not affect the jurisdiction and render the proceedings void. On the contrary, it served him and the defendants the same purpose as if it had been regularly issued, and bore the insignia of the justice's name. Under it he obtained the possession of the property of which the plaintiff has been deprived, and is now without any adequate redress as against him, and neither he nor the defendants will be heard now to say, because of such informality, there was no valid order, and thereby escape liability. Such a position is antagonistic; it blows hot and cold, and will not be tolerated as a defense.

In *Roman v. Stratton*, 2 Bibb, 199, the plaintiff in replevin procured the property to be taken and delivered to him, upon his executing a bond that he would prosecute his claim successfully or return the property. Instead of a successful prosecution of his suit, the proceedings were quashed; whereupon the defendant brought suit upon the bond, and the court held that the irregularities of the plaintiff in the procurement of the writ for the prosecution of the replevin suit would not excuse him from liability on his bond. The court, in delivering their opinion, say:—

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"This objection is predicated upon the irregularity and unwarranted procedure of the party who makes the objection, and over which the defendant in replevin had no control, and to which he was obliged to submit; and however irregular the proceedings were, Roman thereby obtained possession of the property to the injury of Stratton. This bond was freely and deliberately executed as an indemnity to Stratton, if Roman failed in the action of replevin. To permit the party to avail himself of this objection could have no better justification than the party's own wrong. Roman and his sureties must abide the bond."

In *Morse v. Hodsdon*, 5 Mass. 317, the court say:—

"But if the bond be adjudged void, the consequences to the plaintiff will be mischievous. The plaintiff in replevin, under color of it, has obtained possession of the goods of which the present plaintiff has been deprived, who will have no remedy but an action against the officer, which in many cases may be very inadequate, and it would be unreasonable to allow the defendants to dispute the bond voluntarily executed by them after their principal had had the full benefit of it as a legal deed."

A bond given to obtain the release of property seized upon attachment is not rendered invalid by irregularity in the making of such attachment. (*Onderdonk v. Voorhis*, 2 Rob. (N. Y.) 24.) The plaintiff in the replevin, by filing his affidavit and giving the bond with the defendant as sureties, has availed himself of their benefit by obtaining the property; and neither he nor the defendant can defeat their liability because of some irregularity in the proceeding. Having obtained the benefit, they are estopped now from setting up the irregularity. (*Perse v. Watrous*, 30 Conn. 146, 148; *Decker v. Anderson*, 39 Barb. 347; *Coleman v. Bean*, 14 Abb. Pr. 38; *Johnson v. Weatherwax*, 9 Kan. 75; *Franklin v. Pendleton*, 3 Sand. 573; *Decker v. Judson*, 16 N. Y. 442; *Todd v. Gordy*, 29 La. An. 498; *Wachstetter v. State*, 42 Ind. 168; *Nunn v. Goodlett*, 10 Ark. 99; *Wells Replevin*, § 446.)

Some of the authorities go to the extent of holding that a party will not be permitted to defeat his liability upon the bond

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by pleading that the law is unconstitutional, or show a want of jurisdiction in the court before whom the replevin suit was tried.

In *McDermott v. Isbell*, 4 Cal. 113, the court observed:—

“It has been frequently held by this court that a party who avails himself of the process of an inferior court cannot escape the responsibility of his own act, upon the ground that such tribunal had no jurisdiction over the subject-matter in controversy; consequently a party who sues out a writ of replevin from a justice of the peace having no jurisdiction, and obtains the property, in an action on the replevin bond, cannot set up as a defense the want of jurisdiction of the justice.”

In *Magruder v. Marshall*, 1 Blackf. 333, it was held that the defendant in an action on a replevin bond could not question the constitutionality of the statute under which the bond was executed, and although the same court subsequently declined to follow that decision in *Strong v. Daniel*, 5 Ind. 348, the doctrine is maintained in *State v. Stark*, 75 Mo. 566, in which it was held that the obligors in an attachment bond are liable, notwithstanding the bond was given in proceedings under a statute which is unconstitutional. Although there is some conflict of authority upon this subject, none can arise here, as the validity of the law and the jurisdiction of the court are not questioned. The affidavit and bond are sufficient; the only defect being that the order was signed as prescribed in section 132, instead of by the justice, as prescribed in the Justice's Code, p. 464. As a proceeding in the Circuit Court it was in compliance with the law, and invulnerable to attack. With this affidavit, and the indorsement thereon, Britt, and the defendants as sureties, voluntarily and deliberately executed their bonds and delivered them to the officer, upon which Britt obtained possession of the property, and he and his sureties must abide it.

The demurrer should have been overruled, and the judgment must be reversed.

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[Filed March 30, 1882.]

R. S. SHERIDAN ET AL. v. FRANK McMULLEN.

INJUNCTION—WASTE.—A suit will lie for an injunction to stay waste, threatened or being committed.

DOUGLAS COUNTY. Defendant appeals. Affirmed.

J. W. Hamilton, and *E. B. Watson*, for Respondents.

William R. Willis, for Appellant.

LORD, J.—This is a suit brought to enjoin the defendant, who is a lessee of the plaintiff, from the commission of waste upon the leased premises. Among other things, it is alleged in the words of the lease:—

“That it is stipulated and agreed by the defendant in said lease that he would take good care of said premises; to keep the same, the houses, fences, and improvements thereon, in good repair and order. It was further stipulated and agreed by the said defendant and plaintiff that the defendant should remove no wood or timber from said premises, except for his own use, and at no time and under no circumstances should the defendant cut any growing timber along the banks of the South Umpqua River on said premises, or in the grove adjacent to the house, and lying along the said river.” “That the said defendant has violated the conditions of said lease in this, that he has cut the growing timber along the bank of the South Umpqua River, and in the grove adjacent to the house of plaintiff, in this, that the said defendant has cut about five or six large trees in said grove, and threatens to continue in cutting said timber, and will so do unless restrained by this court.” “That by the commission of the act and acts aforesaid, and in the continuance thereof, which is threatened by the defendant, the plaintiff suffers an irreparable injury to said premises, more particularly as follows, to wit: That said trees adjacent to the plaintiff’s house on said premises are shade trees, and are of great value to the plaintiff in affording a protection for the plaintiff’s stock in summer and winter time; that said grove is used in

summer time as a place wherein their sheep are sheared; that plaintiff has taken great pains and trouble in preserving said trees for the purpose and purposes aforesaid, and that said plaintiff is unable to respond in damages."

The answer of the defendant denies each and every allegation, and contains no new matter, except that he alleges "that he has cut and used of the timber on said premises as by the terms of said lease he had the right and privilege to do, and no more; and that in cutting and using said fire-wood on said premises no waste or unnecessary damage was done to the said premises." It is said in *Bouv. Law Dict.*, citing authorities in support of it, that "the revisioner need not wait until waste has been actually committed before bringing his action; for if he ascertains that the tenant is about to commit any act which would operate as a permanent injury to the estate, or if he threatens or shows any intention to commit waste, the court will at once interfere, and restrain him by injunction from doing so." The remedy by injunction to stay waste, threatened or being committed, has been so often asserted, and is now so fully established, that the jurisdiction is seldom questioned. It has almost entirely superseded the common-law action of waste, and in a great measure taken the place of the action on the case for damages, ordinarily resorted to whenever any remedy is sought at law, because of their inadequacy in many cases, and the remedy by injunction is so much more expeditious and complete. In summing up this equitable jurisdiction, JUDGE STORY says:—

"From this very brief view of some of the more important cases of equitable interference in cases of waste, the inadequacy of the remedy at common law, as well to prevent waste as to give redress for waste already committed, is unquestionable, and there is no wonder that the resort to the court of law has in a great measure fallen into disuse. The action of waste is of rare occurrence in modern times; an action on the case for waste being generally substituted in its place, whenever any remedy is sought at law. The remedy by a bill in equity is so much more easy, expeditious, and complete that it is almost invariably resorted to. By such a bill not only may future waste be pre-

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vented, but as we have already seen, an account may be decreed and a compensation given for past waste." (2 Story Eq. Juris. § 917.)

And again:—

"The jurisdiction, then, of courts of equity to interpose by way of injunction in cases of waste may be referred to the broadest principles of social justice. It is exerted where the remedy at law is imperfect, or is wholly denied; where the nature of the injury is such that a preventive remedy is indispensable and it should be permanent; where matters of discovery and account are inadequate to the proper relief; and where equitable rights and equitable injuries call for redress, to prevent a malicious, wanton, and capricious abuse of their legal rights and authorities by persons having but temporary and limited interests in the subject-matter." (2 Story Eq. Juris. § 919; 3 Pomeroy Eq. Juris. § 1348; Wood, Landl. & Ten. §§ 427, 428, 429, and notes.)

In *Fleming v. Collins*, 2 Del. Ch. 230, it was held that the cutting of timber is an injury of irreparable nature and remediable in equity, by whomsoever committed, and that equity, having jurisdiction to restrain waste, will decree an account and satisfaction for the waste committed. (*Allison & Evans' App.* 77 Pa. St. 225; *Kane v. Vanderburgh*, 1 Johns. Ch. 11.)

Upon the facts, there can be no doubt of the cutting of the timber; but the contention of the defendant is that the timber he cut was not within the grove adjacent to the house and reserved in the lease. The lease prescribes that the defendant shall not cut any growing timber along the bank of the South Umpqua, or in the grove adjacent to the house; but the specification of the charge and the evidence is more particularly directed to the destruction of the growing timber in the grove adjacent to the house. To avoid the effect of this, it was sought to show, by another provision of the lease, that the charge was inconsistent with the lease. The provision is that "it is also further agreed that the said McMullen shall cut or remove no wood or timber from said premises except for his own use, and at no time and under no circumstances shall he cut any growing

timber along the banks of the South Umpqua River, or in the grove adjacent to the house, and also in the grain-field." But we cannot concur in the criticism suggested. We think it is plainly intended to read, "and at no time and under no circumstances shall he cut any growing timber along the banks of the South Umpqua River, nor (shall he cut any growing timber) in the grove adjacent to the house," etc. This is manifestly consistent with the whole lease, and to which the allegation and evidence were more especially directed.

The charge is explicit and definite, and the only question now is whether the growing timber cut by the defendant was cut in the grove adjacent to the house and reserved in the lease. The evidence shows that a short distance from the house, upon the banks of the Umpqua River, is a knoll, or piece of rising ground covered with large oaks, which the father of plaintiff, years previously, thinned out, and trimmed many of the trees left standing, for their better preservation and growth; that it possesses singularly excellent advantages as a location for building purposes, and that it has been preserved and protected with some prospective reference to this object; and that it has been used by the plaintiff as a convenient place to corral his sheep, and to shelter and to shear them. There is evidently an abundant supply of timber upon the farm, enough and to spare, for more than all ordinary purposes of fire-wood and repair. The evidence of the defendant seeks to connect this grove with a belt of timber or contiguous patches of growing timber, in which he was authorized to cut by the terms of the lease, and thus show that the acts of alleged waste were not committed in the *locus in quo*. But this grove adjacent to the house, although there is other growing timber near it, cannot thus be confounded. The uses to which it has been put, the care which has been taken to preserve it, its location and superior advantages for many purposes, give it a character and identity that plainly distinguish it from those other places of growing timber in which the defendant was permitted to cut his fire-wood. We think the evidence shows conclusively that it was in this grove, reserved in the lease and charged in the bill, in which the acts of waste were committed

Argument for Appellants.

by the defendant; and judging from the spirit of some of his remarks in reference to it, the defendant will continue, unless restrained, to commit further acts of waste.

We think, therefore, the court below did right and equitably in granting the injunction, and the decree therein must be affirmed.

[Filed April 6, 1885.]

THE STATE OF OREGON v. MARTIN MACKEY
AND WM. MACKEY.

NEW TRIAL—DISCRETION—APPEAL.—A motion for a new trial upon the ground of the insufficiency of the evidence to justify the verdict is addressed to the sound discretion of the court in which it is made, and cannot be reviewed on appeal.

EVIDENCE—IMPEACHING WITNESS—HOSTILE DECLARATIONS.—There is no difference in principle between admitting declarations of hostility of a witness, for the purpose of affecting the value of his testimony, and admitting contradictory statements for the same purpose.

ID.—DECLARATIONS OF PARTY AS TO PHYSICAL CONDITION.—The declarations of a party are received to prove his physical condition and symptoms, whether arising from sickness or injury.

CRIMINAL LAW—INDICTMENT—PLEA OF NOT GUILTY—CHARGE TO THE JURY.—The plea of not guilty puts in issue every material allegation in an indictment. An instruction that "the State has fully established" the fact of the killing, and that "the only material allegation about which there is any dispute is that which charges these defendants with having purposely and of deliberate and premeditated malice caused the death of," etc., is error. The killing of deceased by the defendants must be found by the jury before the question of premeditation or malice could arise.

JOSEPHINE COUNTY. Defendants appeal. Reversed and new trial ordered.

The facts sufficiently appear in the opinion.

P. P. Prim, and J. F. Watson, for Appellants

The court erred in not allowing John Mack to answer the impeaching question asked him by the defense, as follows:—"Did you not say to George and William Wimer the day following the examination, at their store in Waldo, no other parties being present, that there was not evidence enough to hold

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19 71
6* 648
23* 816

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the G—d—Mackeys, but you intended to send them to jail and then hunt up the evidence?" (1 Wharton Ev. 408, 527, 545; *Day v. Stickney*, 14 Allen, 255; *Harper v. Lamping*, 33 Cal. 647; *Newton v. Haines*, 6 N. Y. 345.) Also in sustaining the objection to the following question asked by defendants' counsel of A. J. Henderson: "Did not Martin Mackey, on account of his physical condition, decline to go up and show you the claim on the morning of the second day?" (*State v. Glass*, 5 Oreg. 73; *Insurance Co. v. Mosley*, 8 Wall. 397; *Commonw. v. Fenno*, 134 Mass. 217.) If the verdict was clearly against the evidence, it was an abuse of discretion to overrule the defendants' motion for a new trial. (*People v. Jones*, 31 Cal. 566–571; 1 Greenl. Ev. 49; *Reynolds v. People*, 41 How. Pr. 179.) The court erred in giving the following instructions: "It is charged in the indictment that Michael Purcell was killed on the 26th day of June, 1884, but it is sufficient if it be shown that the killing was done at any time prior to the finding of this indictment, that is, the 29th day of October, 1884. This the State has fully established. The State has also fully proved that Michael Purcell came to his death in Josephine County, Oregon, by having been shot with a gun. The only material allegation of said indictment about which there is any dispute is that which charges these defendants with having purposely and of deliberate and premeditated malice caused the death of Michael Purcell." (*State v. Whitney*, 7 Oreg. 386; *State v. Grant*, 7 Oreg. 414; *People v. Dick*, 32 Cal. 213; *Weyrich v. People*, 89 Ill. 90.)

Thos. B. Kent, District Attorney, and *Wm. H. Holmes*, for Respondent.

LORD, J.—The defendants, father and son, were indicted jointly and tried jointly for the crime of murder, found guilty, and sentenced to be hanged. The bill of exceptions purports to contain, in substance, the whole testimony, and the first point suggested is the insufficiency of the evidence to justify the verdict. This alleged error applies to the denial of the defendants' motion for a new trial. There are cases in which it has been

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held that a motion for a new trial is addressed to the sound discretion of the court below, and that the overruling of such a motion will not be reviewed unless there is a plain abuse of such discretion. This is conceded, but it is earnestly and strenuously insisted that the evidence is so manifestly insufficient, and particularly as against the son, to sustain the verdict, that it falls within the rule laid down in those cases which would authorize the court to review and set aside the verdict. But a different doctrine seems to have been held by this court in *Hallock v. City of Portland*, 8 Oreg. 29. PRIM, J., in delivering the opinion of the court, said:—

“As the motion for a new trial was based wholly upon the insufficiency of the evidence to justify the finding of fact, the granting of the motion was a matter resting wholly in the discretion of the court below, and cannot be reviewed on appeal.” (*State v. Wilson*, 6 Oreg. 428; *State v. Fitzhigh*, 2 Oreg. 227; Hil. N. T. 7; *Pomeroy's Lessee v. Bank of Indiana*, 1 Wall. 597; *Pennsylvania M. Co. v. Brady*, 14 Mich. 260; *Boykin v. Perry*, 4 Jones (N. C.) 325.)

It is true, the evidence against the defendants is wholly circumstantial; and there can be no doubt but what that portion of it which relates to the son is extremely slight upon which to found a verdict. But the authorities cited indicate that such matter is not reviewable on appeal.

It is next assigned as error that the court erred in not allowing John Mack to answer the impeaching question asked him by the defense, if he had not said to one Miner—the time, place, and parties present being stated—that there was not evidence enough to hold the G—d—Mackeys, but that he intended to send them to jail and to hunt the evidence afterwards. The object of this evidence was to impair the force of the witness' testimony as showing that he entertained hostile or embittered feelings against the defendants. He was the magistrate who had bound the parties over, and a witness for the prosecution. The ends of justice are best attained by allowing a free and ample scope for scrutinizing evidence and estimating its real value. The question put contained all proper informa-

tion as to time, place, and persons present, and the precise matter which was to be used against him; so, in the event he should admit having made such declaration, an opportunity would be afforded him to rebut or explain it. There is no distinction, so far as the rule is concerned, between admitting declarations of hostility of a witness for the purpose of affecting the value of his testimony, and admitting contradictory statements for the same purpose, as in either case an opportunity should be given the witness to explain what he said. The witness should have been allowed to answer the question; to say whether he did or did not make the alleged statement; or, if he did, to make his explanation of it. By so doing the jury would have been put in a position of estimating the real value of his testimony; of determining whether he was an impartial witness, testifying without prejudice or passion, or, in fact, a hostile witness, whose prejudices and passion had colored his testimony, and requiring it to be closely scrutinized and weighed.

It is next objected that the court erred in sustaining the objection of the State to the question asked by the defense of A. J. Henderson, whether or not Martin Mackey did not decline, on account of his physical condition, on two days, to go out and show the claim. It appears at the June election, previous to the time indicated in the question, that Mackey had been severely beaten and bruised by the deceased, and that he was some time in recovering from the effects of it, and regaining his accustomed strength and health; that before he had entirely recovered some parties desired to purchase his mining claim and went to his cabin to see him, and it was proposed to show by the question that he was then in such a debilitated physical condition as caused him to decline to go out and show the mine, which was some distance off. The ultimate object of the evidence was to show that his physical weakness was such at the time of the murder that, considering the distance from his cabin, he would have had to travel over a rough and brushy trail across the mountains to the cabin where the deceased was killed; that it could not reasonably be attributed to him; in other words, if believed, it would have been a circumstance

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which would have gone far to prove that he did not commit the crime. It seems that he wanted to sell his mine, and if he was unable or declined to accompany the parties for the purpose of examining it, because of his physical debility, his complaints of a present existing pain or malady would be admissible. The declarations of a party are received to prove his condition, ills, pains, and symptoms, whether arising from sickness, or an injury by accident or violence.

It is also objected that the court erred in not allowing the cross-questions asked by the defense of Charles Hughes, County Clerk, as follows:

"Did Mr. Thompson go to you at the time you stated, and ask to see the boots in your possession (referring to Mackey's boots), said to belong to Mackey, and did he not, after examining them, exclaim, 'that is all right?'"

The boots which Mackey wore were in the possession of the officer, and were used in the prosecution as one of the strong circumstances in the case as connecting the elder defendant with the crime, and we think the witness should have been allowed to answer the question.

The next objection is to an instruction of the court as follows:—

"It is charged in the indictment, as I have said, that Michael Purcell was killed on the 26th day of June, 1884, but it is not necessary for the State to prove that, or any other particular date in that connection; and it is sufficient if it be shown that the killing was done at any time prior to the finding of this indictment; that is, the 29th day of October, 1884. *This the State has fully established.* The State has also fully proved that Michael Purcell came to his death in Josephine County, Oregon, by having been shot with a gun." "The only material allegation of said indictment about which there is any dispute is that which charges these defendants with having purposely, and of deliberate and premeditated malice, caused the death of Michael Purcell."

The effect of this instruction was virtually to take away from the consideration of the jury the only real disputed question in

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the case. It states that "it is sufficient if it be shown that the killing was done at any time prior to the finding of the indictment"; and then adds, "this the State has fully established." The defendants had pleaded not guilty to the indictment, and this put in issue every material allegation, and the proof of them devolved upon the State. The killing of the deceased by the defendants was the fact in dispute, and must necessarily be found by the jury before the question as to whether it was done premeditatedly or not could arise. It was a fact for the jury to find, and belonged exclusively to their province to determine from the evidence. But this fact the court withdraws from their consideration by instructing them it is fully established, and that the only question about which there is any dispute is that which charges the defendants with having purposely, and of deliberate and premeditated malice, caused the death of Michael Purcell. The effect of the instruction was admitted at the argument, but it was sought to avoid it by the statement that this fact was expressly admitted by the counsel for the defendants in making his opening statement. But we do not thus understand the record, nor think any such admission was intended or meant, upon the facts disclosed by the record. The fact that Purcell had been killed was admitted. He had been found dead in his cabin, and evidently shot to death by someone. A coroner's jury had performed its office over his remains, and the fact that Michael Purcell was killed was well known and generally admitted. And this is all Judge Hanna's statement amounted to. He admitted that Michael Purcell had been killed, but he did not admit that the defendants had done the deed. The doing of the deed was the fact in dispute, and which the defendants had denied by their plea to the indictment. By the indictment the defendants were not only charged with the killing of the deceased, but doing it with malice and premeditation. These were facts to be proved by the State, and to be found by the jury upon the issue joined.

The killing of Michael Purcell by the defendants was, therefore, one of the principal facts in dispute, and which it was the duty of the jury to determine from the evidence. It was

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for them to say whether the evidence fully established this fact, and not for the court. And this is rendered all the more mischievous and dangerous from that which follows, that "the only material allegation about which there is any dispute is that which charges the defendants with having purposely caused the death of Michael Purcell." There is no other question, because the killing of the deceased by the defendants being fully established, the only remaining question was whether it was done with malice and premeditation. This was consistent with what had preceded; and as the killing had been fully established in the opinion of the court, it was natural that this fact should have been assumed, and the attention of the jury directed to the only question about which there was any dispute: In *People v. Dick*, 32 Cal. 216, the court say:—

"It is better for the court, in charging the jury in a criminal case, to avoid assuming any material fact as proved, however clear to the mind of the court such fact may seem to be established, because it is the province of the jury, unaided by the judge, to say whether a fact is proved or otherwise."

And in *State v. Whitney*, 7 Oreg. 309, Kelly, C. J., said:—

"It is the exclusive province of the jury to determine questions of fact. They and they only have a right to judge of the credibility of witnesses, and the weight and effect of their testimony. And it has always been held to be an erroneous instruction when the court assumed any controverted fact to be proven, instead of submitting to the jury the question whether or not it has been established by the testimony before them."

The judgment must be reversed, and a new trial ordered.

Argument for Appellant.

[Filed April 7, 1885.]

L. FLESCNER v. ALEX. SUMPTER, GEO. L. HIBBARD, AND J. W. BRAZEE.

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227	215

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CONVEYANCE — ACKNOWLEDGEMENT — REGISTRATION — PRIORITY. — On the 17th day of April, 1880, the defendant S. executed and duly acknowledged in this State, a mortgage to the plaintiff of the premises in controversy. On the 15th day of June following, in Idaho Territory, the wife of the grantor signed the same mortgage, and acknowledged it before a clerk of a District Court of said Territory, and at the same time and place the same parties executed a deed of said premises to the defendants H. and B., and acknowledged it before the same officer. Neither instrument was accompanied by a certificate from the proper officer that it was executed and acknowledged in accordance with the laws of said Territory. Both were filed for record at the same time. *Held*, (1) That the due acknowledgement of said mortgage by the husband, entitled it to record without regard to the mode of execution by the wife. (2) That said deed was not entitled to record for want of the certificate aforesaid. (3) That where neither of two conveyances is recorded within five days from the time of execution as provided in section 26, Misc. Laws, the one thereafter first recorded will take precedence. (4) That under the recording acts of this State, a mortgage stands upon the same footing as an absolute conveyance.

FINN COUNTY. Plaintiff appeals. Reversed and decree ordered foreclosing plaintiff's mortgage.

The facts are stated in the opinion.

Joseph Simon, for Appellant.

The deed to Hibbard and Brazee, not having the certificate required, though filed for record, was not entitled to be there, and did not operate as constructive notice. There is no contention that plaintiff had any actual notice or knowledge of this deed. (*Musgrove v. Bonser*, 5 Oreg. 313, Jones on Mortgages, § 550.) The mortgage was executed and delivered long prior to the time of the execution of the deed, and both recorded at the same time, and this would give plaintiff a priority over defendants Hibbard and Brazee. (*Pomeroy Equity*, §§ 591, 678.) Taking the case in its strongest aspect against the plaintiff, the equities of the parties are at least equal, and, therefore, the mortgage and deed having been recorded at the same time, were concurrent liens upon the property, and the proceeds of the sale of the same should be distributed *pro rata*. (*Humphrey v. Hayes*,

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94 N. Y. 600; *Granger v. Crouch*, 86 N. Y. 494; *Collerd v. Huson*, 34 N. J. Eq. 38.) When a mortgage is taken to secure a pre-existing debt the mortgagee does not become a purchaser in that sense, which, being without notice of a pre-existing equity, would cause his title to prevail over that of the prior equitable claimant. (*Willard v. Ramsburg*, 22 Md. 206; *Wells v. Morrow*, 38 Ala. 125; *Cary v. White*, 52 N. Y. 138; *Pancoast v. Duval*, 26 N. J. Eq. 445; *Mingus v. Condit*, 23 N. J. Eq. 313; *Dickerson v. Tillinghast*, 4 Paige, 215; *Manhattan Co. v. Evertson*, 6 Paige, 457; *De Lancey v. Stearns*, 66 N. Y. 157; *Metropolitan Bank v. Godfrey*, 23 Ill. 606.)

Raleigh Stott, for Respondents.

THAYER, J.—This appeal is from a decree of the Circuit Court for the county of Linn, rendered in a suit commenced by the said appellant and C. H. Lewis, as plaintiffs, against Alexander Sumpter, Jr., Lydia Sumpter, George L. Hibbard, and J. W. Brazee, as defendants, to foreclose a mortgage bearing date April 17, 1880, executed by said Alexander and Lydia Sumpter, to said plaintiffs, upon certain real property situated in said county of Linn, to secure two promissory notes given severally to the plaintiff. In the early part of the suit it was ascertained that the note to Mr. Lewis had been paid, and therefore it was dismissed as to him. The defendants Hibbard and Brazee were made parties to the suit as subsequent encumbrancers of the premises described in the mortgage as “the west half of claim No. 68, notification No. 1,394, being a part of sections 21 and 28, in T. 10 south of range 2 west, W. M., situated and lying in Linn County, Oregon, and containing 160 acres more or less.” The defendants Hibbard and Brazee, after having demurred to the complaint upon the ground that the land was not sufficiently described in the mortgage, and after the demurrer had been overruled by the Circuit Court, filed an answer denying that said mortgage was executed or delivered until the 22d day of June, 1880; denied that said notes and mortgage had not been paid, and in which answer they alleged that on the 15th day of April, 1880, said Alexander Sumpter was the owner of the

land, and that on that day said defendant, at Portland, entered into a contract for the purchase of it from him; that on the 17th day of April, 1880, said defendants went into possession of said land under said contract, and had ever since held the same as owners thereof; that such possession had been open, notorious, and adverse, and that the plaintiffs had notice thereof prior to the time the mortgage was executed or delivered, and that the defendants had no notice or knowledge of said mortgage until the 22d day of June, 1880, and had paid for the land prior thereto; that said Alexander Sumpter and Lydia Sumpter, who is the wife of said Alexander, conveyed the land to said defendants, who had ever since been the owners thereof in fee. Issue having been taken to the new matter of the answer by a reply duly filed by the plaintiffs, and the said parties having duly made their proofs in the case, the suit came on for hearing before the Circuit Court at the October term thereof, 1884. The service of summons was made upon the defendants Alexander and Lydia Sumpter by publication, and no appearance was entered for them therein. The Circuit Court dismissed the complaint, and entered a decree that the appellant pay the costs, which is the decree appealed from.

It appears from the proofs that the said Sumpter and wife were, at the time of the alleged transaction, residing in Idaho Territory, where they have been residing for a considerable period, and where the said Alexander Sumpter, Jr., had been carrying on business; that he opened an account with the defendants Hibbard and Brazee as early as the 27th day of November, 1879, and from whom he had been purchasing boots and shoes, they being wholesale dealers in those articles at Portland. The appellants and Mr. Lewis were also wholesale dealers at Portland during the same time, each of whom were interested in separate houses engaged in the mercantile business. It also appears that on the 15th day of April, 1880, and for a few days thereafter, the said Alexander Sumpter was at Portland purchasing supplies to add to his stock in trade; that he was then owing the defendants Hibbard and Brazee a balance of \$658.25, and was desirous of purchasing from them more of

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their goods, and also during the same time desired to make purchase of bills of goods from the firms of which Fleschner and Lewis were respectively members; that when he came upon Hibbard and Brazee he proposed to sell them his land, the premises in question, and that they, acting through Mr. Hibbard, proposed to buy the land. The price asked was \$2,060, and they agreed finally to make the purchase at that price, and a memorandum was drawn up between them, and other writings executed of the same date, showing that such purchase was made. That when said Sumpter called upon the appellant's firm he proposed to execute a mortgage, to secure the payment of his accounts, upon the same premises, and that he made purchases from each of said firms. The amount of the bill purchased from appellant's firm was \$831.25. A mortgage was executed to secure the payment of each purchase, and of the respective notes given therefor. The said mortgage was duly acknowledged by Alexander Sumpter, upon the day it bears date, before Joseph Simon, a notary public of this State at Portland, and the appellant claims that it was on that date duly delivered to him, but that, desirous of having Mrs. Sumpter also sign and acknowledge it, he gave it to Alexander Sumpter to take back with him to his residence in Idaho for that purpose. It appears that Sumpter, at the same time, arranged with Messrs. Hibbard and Brazee to have his wife also execute jointly with him a deed to them of the premises. It further appears that after said Alexander Sumpter got back to Idaho, he and his wife, Lydia Sumpter, on the 15th day of June, 1880, executed to the defendants Hibbard and Brazee a deed to said premises, described the same as in said mortgage, and at the same time the said Lydia executed the said mortgage, and that both of them acknowledged the said deed, and the said wife acknowledged said mortgage, before a clerk of one of the District Courts of said Territory, and that said Alexander Sumpter forwarded both instruments to the respective parties to whom they were so executed, by the same mail; that they thereupon respectively forwarded them by the same mail to the clerk of the said county of Linn for record; and that the said clerk informed the respective parties of the

peculiar condition of their affairs relating to the matter, which information was conducted also by the same mail.

It is contended by each of the respective counsel that their claim is superior to the other. The appellant's counsel argues that the defendants Hibbard and Brazee had notice of the appellant's note and mortgage before said Sumpter sold the premises to them. In order to establish this, he proved by Solomon Hirsch, one of the members of the same firm with the appellant, that Hibbard, on the 17th day of November, 1880, admitted to him that Sumpter had told him, before he had agreed to sell him the farm, that he had given the note and mortgage for goods purchased of said firm. Hibbard, however, positively denies that he ever made any such statement; and as I consider it, that leaves the matter the same as though no evidence had been given upon the point. Both witnesses are entitled to the same credit, and the testimony of the latter (Mr. Hibbard) neutralizes that of the former.

The respondents' counsel argues that the claim of his clients is anterior to that of the appellant. He attempts to establish this by claiming that the sale of the premises occurred on the 15th day of April, 1880, and that the mortgage was not executed until a subsequent time; but he cannot maintain it from the testimony. Hibbard testified, it is true, that he purchased the place for his firm, and closed the bargain on or about the 15th day of April, 1880; but Mr. W. R. Bishop testified that on the 16th day of April, 1880, Alexander Sumpter said to him that he had sold to Hibbard a certain tract of land in Linn County, and asked him if he knew the location, and notified him that he would ask him to describe the land to Mr. Hibbard before he left Portland; that the next day Sumpter and Hibbard came to the office of the Brownsville Woolen Mills Company and desired witness to describe the land. This last date is the same as that of the contract of sale, and the other writings before referred to. This testimony, taken in connection with that of Mr. Hibbard, set out in respondents' briefs, shows pretty conclusively that the sale was not completed before the 17th of April. Mr. Hibbard testified upon the point referred to as follows:—

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“Sumpter had a farm to sell in Linn County, Oregon. It contained, Sumpter said, 160 acres of land. He proposed to sell our firm that place on or about April 15, 1880; price being \$2,060. Not knowing anything about the place, he referred us to Mr. Bishop. He went and called Mr. Bishop’s attention to the place.”

How can it be consistently claimed, in view of this evidence, that the sale and purchase were made before Mr. Bishop was consulted, when he was referred to by Sumpter as being acquainted with the place and subsequently called upon to describe it? It is not at all probable that Hibbard first bought the land and afterwards sought the information regarding it, which he evidently intended to act upon before making the purchase. The evidence and circumstances show beyond question that the sale was not made prior to the 17th day of April, and that all that had taken place between the parties prior thereto had been negotiation simply. The contract of sale and the mortgage were evidently intended to be and were concurrent acts. Each bears the same date; each was executed upon the same occasion and for the same object, viz., to enable Sumpter to obtain credit. He had come to buy goods; had the land in question, and very probably intended to make such a use of it as would secure the greatest extent of credit. He would certainly not be likely under the circumstances to inform the parties with whom he dealt as to the purposes of his scheme, for that would have frustrated it. It appears, also, from the circumstances, that either through a sense of justice or from policy he intended to leave the parties he traded with equally entitled to the property as purchasers and mortgagees. There evidently was method in his rascality, and he consummated it with adroitness.

The appellant’s counsel laid great stress upon the rule of equity that a party cannot claim to be an innocent purchaser of an estate when the consideration of the purchase is past indebtedness. The rule that the rights of a purchaser will not prevail over those of a holder of an outstanding equity unless he has paid value for the property, or parted with some security, does

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2. Here the rights of the respective parties are equal. Sumpter was buying goods from the respondent. He was interested in this case at the same time, and he sought to secure them by means of the same property. The respondents Hibbard and Brazee bargained for the land. The appellant's claim was not outstanding; neither was the respondent's claim. Both have been anterior to the other; consequently the counsel would invoke will not distinguish the rights of the parties, viewed wholly from an abstract point of view, are so nearly equal that human knowledge is unable to distinguish any difference in favor of either party. The parties were attempting to secure their just claims, and were unable to perceive that either attempted to take more of the other. And I should most decidedly regard the land as a common fund, to indemnify each party for one fact in the case which, I think, is in favor of the better right. The mortgage from the land to the appellant was properly acknowledged and recorded; but the deed from Sumpter and wife to Hibbard and Brazee was not entitled to record, and was not attested by the proper officer to the effect that the deed was filed in the District Court of Idaho Territory, before judgment was taken, was such clerk, or that the deed was filed in accordance with the laws of that Territory. (12, Misc. Laws, pp. 516, 517, Gen. Laws of Oregon, 5 Oreg. 313.) The same may be said of the deed, so far as the execution thereof by Lydia Sumpter is concerned. But its execution by Alexander Sumpter, and its acknowledgment thereof, were sufficient to entitle it to be recorded, and those claiming under him, it was

the respondents' counsel, that the mortgage, not recorded within the five days specified in section 26, Gen. Laws Oreg., would not give it priority over a conveyance, or one recorded subsequently. The section last referred to will bear no such construction. It provides merely that a conveyance not

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recorded within five days after its execution shall be void against any subsequent purchaser in good faith, etc., of the same property, whose conveyance shall be first duly recorded. The prior recording of the prior conveyance at any time after its execution will give it precedence. So will the prior recording of the subsequent conveyance give it precedence over a prior one subsequently recorded, although neither of them be recorded within the five days. A mortgage, under our recording act, stands upon the same footing as an absolute conveyance, and if the mortgagee take it in good faith and for a valuable consideration, the recording of it will give it a preference over a prior unrecorded deed, though the latter should be recorded no more than five minutes thereafter. If a subsequent grantee or mortgagee obtains in such a case a priority over a former one by virtue of the recording act, then, *a fortiori*, should the appellant in this case, where the equities between the parties are equal. The demurrer to the complaint was properly overruled. The description of the premises in the mortgage is capable of being made certain. The term "notification" clearly indicates that the claim there referred to was a donation claim, and it does not appear but that it is shown upon the maps and plats of the United States land office, and can be found in the field from its description in the mortgage. I should infer that it does so appear, and that it could be so found without difficulty.

Under this view the decree appealed from will be reversed, and the appellant entitled to a foreclosure of the mortgage to the extent of Alexander Sumpter's interest in the premises at the date of the said mortgage.

LORD, J., concurring.

Argument for Appellant.

[Filed April 13, 1885.]

C. W. BURRAGE ET AL., EX'RS, v. BONANZA GOLD
AND QUICKSILVER MINING CO.

ACTIONS AND SUITS.—In this State, the distinction between actions at law and suits has not been abolished.

1D. — COUNTER-CLAIM.—A counter-claim to a suit must be one upon which a suit might be maintained by the defendant against the plaintiff. An unliquidated demand triable before a jury, and bearing no relation to the subject of the suit, cannot be used as a set-off to a suit in equity.

DOUGLAS COUNTY. Defendant appeals. Decree affirmed.

W. B. Gilbert, for Respondents.

"In an action by an executor or an administrator, no demands can be set off which were not held by the defendant at the death of the decedent." (Bliss Code Pleading, § 377; *Root v. Taylor*, 20 Johns. 137.) The decision in this case was based upon the statute, but that statute has been said by the courts of New York to be but a declaration of the law as it existed before. (*Mercein v. Smith*, 2 Hill, 213.) The claim of Ray and Doty, if it ever became due, matured after the decease of Charles Hodge, and on that account, if for no other reason, could not be a counter-claim to this suit. Under our Code the counter-claim in equity "shall be one upon which a suit might be maintained by the defendant against the plaintiff in the suit." (Civ. Code, § 389.) The mere existence of cross-demands will not be sufficient to justify a set-off in equity. (2 Story Eq. § 1436; *Naglee v. Palmer*, 7 Cal. 543.) The alleged counter-claim did not in any way grow out of the transaction upon which the suit was brought, and could not be pleaded as a counter-claim. (*White v. Williams*, 3 N. J. Eq. 376.)

C. Ball, and William R. Willis, for Appellant.

A demand assigned before the commencement of the suit may be set off. (Waterman Set-Off, § 96.) The demand need not be due at the death of the testator to be a set-off. (Waterman Set-Off, § 97; *Mathewson v. Strafford Bank*, 45 N. H. 104—

12	169
15	472
20	107
22	313
6*	793
15*	850
25*	363
29*	980

12	169
32	551

12	169
41	606
41	607

12	169
45	59

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108.) The statutory counter-claim includes a set-off and more. It embraces not only the equitable set-off, but also any claim which the defendant may have against the plaintiff in the nature of a cross-action. (Waterman Set-Off, § 590; Howard New York Code, § 150, notes; Civ. Code, pp. 119, 120, §§ 71, 72; p. 191, § 389; *Boston Mills v. Hull*, 6 Abb. Pr. N. S. 319, 322.) Claims by or against executors may be set off. (Woods' Mayne Damages, § 132; *Irons v. Irons*, 5 R. I. 264; *Dorsheimer v. Bucher*, 7 Serg. & R. 8; *Medomak Bank v. Curtis*, 24 Me. 36; *Bordman v. Smith*, 4 Pick. 211.) Upon a foreclosure, the mortgagor whose personal liability is sought to be enforced may set off any debt or demand against the plaintiff which he may own at the commencement of the suit. (2 Jones Mortgages, §§ 1496, 1497; Waterman Set-Off, § 97; *Hooper v. Armstrong*, 69 Ala. 343.) It is only where an estate is insolvent, or there is a statutory inhibition, that claims purchased by the defendant are not good offsets against a suit brought by executors, or where the claims are in different relations to each other. (*Bridge v. Johnson*, 5 Wend. 341; *Root v. Taylor*, 20 Johns. 136; *Wolfersberger v. Bucher*, 10 Serg. & R. 10; *Whitehead v. Cade*, 1 How. (Miss.) 95.)

LORD, J.—This is a suit in equity for the foreclosure of a mortgage. In substance, it is alleged that on October 4, 1881, the corporation defendant made its note and mortgage to Charles Hodge for \$1,550, due one year from date; that the mortgage was duly recorded on October 7, 1881; that no payment has been made thereon; that in March, 1883, Charles Hodge died, and the plaintiffs are the executors of his last will and testament, admitted to probate in Multnomah County; that the defendants Winterburn and Napier claim an interest in the mortgaged real estate through a lease of the same, executed on July 5, 1881, for a term of five years, and an extension of the same made on October 4, 1881, for an additional term of five years; that the lease and extension of the same were made subject to the mortgage by express agreement of the parties and the terms of the instruments; and that said mortgage was made

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to secure a loan from Charles Hodge, to discharge the lien of a judgment on said real estate rendered in May, 1881, and that the lease of July 5, 1881, was to remain in escrow until the loan of this money should be secured.

The corporation denied that the lease or extension was made subject to the mortgage, and alleged that the company delivered the lease of July 5th to Winterburn and Napier, the lessees, and they thereupon took possession of the leased property; that on July 18, 1881, the lessees sold and conveyed to H. D. Ray and S. J. Doty a one-half interest in the lease; that on September 29, 1881, Ray and Doty conveyed their interest in the lease to Charles Hodge for \$4,000; that on October 4th Charles Hodge paid on account of said purchase price \$1,500, and has never paid the remainder; that on October 4, 1881, the company executed to Winterburn and Napier a five-years extension of the lease, and the conveyance of the half interest was surrendered up to Ray and Doty, and was canceled by them, and a conveyance of a half interest in the lease, and the extension was made direct from Winterburn and Napier to Charles Hodge by agreement of all parties; that after the death of Charles Hodge, and in May, 1883, Ray and Doty presented their claim for \$2,500 balance to the executors of the will of Charles Hodge, deceased; that on July 2, 1883, Ray and Doty assigned said claim to the corporation, and on October 8, 1883, the executors disallowed said claim.

Said corporation prayed for a decree for \$2,500 against the plaintiffs. The reply denied the delivery of the lease before October 4, 1881; denied, on information and belief, the sale to Charles Hodge; the transfer of the claim to the corporation; the agreement to pay \$4,000 for a half interest in the lease; and denied that any sum was due from Charles Hodge or his estate therefor. The decree found that the mortgage was subsequent to the lease of July 5, 1881, but prior to the extension of the lease, and decreed the foreclosure of the same and the sale of said real estate, subject to said lease. While it was maintained by counsel for the plaintiff that there was no evidence to justify the finding of the court that the extension of the lease was prior

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to the mortgage, no appeal was taken from it, and the decree in that particular must be regarded as satisfactory.

The chief questions submitted at the argument and presented by this record are, (1) whether the matter alleged under our practice will constitute a set-off in equity; and (2) whether a demand can be set off which was not held by the defendant at the death of the decedent. In the practice Codes of nearly all the States, the old forms of action have not only been abolished, but they have abolished the distinction between actions at law and suits in equity. In this State the distinction heretofore existing between forms of action at law has been abolished (§ 1, Civ. Code); but proceedings in equity are still kept distinct from an action at law. (See ch. 5, Suits in Equity, Code, 189.) Mr. Bliss, in his valuable work on Code Pleading, has noticed this exception in our State, where he says:—

“We have seen that in the States adopting the New York system, except Kentucky, Arkansas, Iowa, and Oregon, the distinctions between actions at law and suits in equity are abolished, either directly, or by prescribing that there shall be but one form of action.” (Bliss Code Plead. § 10.)

As a consequence of not always bearing this important distinction in mind when references have been made to the decisions of other States under the practice Codes, in *Beacannon v. Liebe*, 11 Oreg, 443, THAYER, J., said:—

“The appellant’s counsel claimed upon the argument that our Code had so blended law and equity that if the facts alleged in the complaint showed a case cognizable in equity, although it was brought as an action, the court ought not to dismiss it, but to retain and try it as a suit. I am unable to indorse this view. Our Code, I think, preserves the forms of actions and suits as distinct from each other. There may be no very good reason why this distinction has been retained, but it is too strongly indicated in the Code to be ignored by the courts, and any change made in the practice in that particular must be effected by the legislative branch of the government. Litigants, in my opinion, will be compelled at their peril to select as to which of the two jurisdictions they will resort to for relief,

so long as the present line of partition between them is kept up.”

In our practice, a suit is in equity, and relates to something of equitable as distinct from legal cognizance. It is admitted that the matter alleged as a set-off is of purely legal cognizance; but it is contended that it may be pleaded as a counter-claim to the suit of the plaintiffs, for the purpose of qualifying or reducing the amount of their demand. A counter-claim is comprehensive of both recoupment and set-off, and is also broader. In actions at law, or in suits in equity, it imports a claim opposed to, or which qualifies, or at least in some degree affects, the plaintiff's cause of action or suit. As applicable to suits in equity, it is provided by section 389, Civil Code, that “the counter-claim of the defendant shall be one upon which a suit might be maintained by the defendant against the plaintiff in the suit; and in addition to the cases specified in the subdivisions of section 72, it is sufficient if it be connected with the subject of the suit.” In construing this section in *Dove v. Hayden*, 5 Oreg. 501, the court say:—

“The counter-claim, therefore, which the defendant is authorized to interpose, must be one upon which a suit might be maintained by the defendant against the plaintiff in the suit, and must be connected with the subject of the suit.”

Here it is plain that the counter-claim was dismissed on the ground that the original proceeding was a suit in equity, and the counter-claim was for a legal demand, and that it was not connected with the subject of the suit. Again the court say:—

“The Code, in allowing counter-claims in suits in equity, seems to have adopted substantially the rule in regard to filing cross-bills. Under the former chancery practice the cross-bill only relates to matter touching the matter in the original bill. It could not embrace new and distinct matters not embraced in the original bill; and if it did, no decree could be founded upon such matter.”

See also *Beacannon v. Liebe*, *supra*.

In *Tribble v. Taul*, 7 Mon. 457, the court, in commenting

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upon the cases in which courts of equity would entertain jurisdiction of set-off, say:—

“The demands must be connected, or one must form the consideration of the other; or there must have been demands already completely liquidated and settled at law, such as mutual judgments; or there must be some obstacle to the complainant, who strives to set off his claim, proceeding at law, such as non-residence, insolvency, or the like; or the claim must be one over which chancery held either exclusive or concurrent jurisdiction originally.”

The counter-claim under section 389, *supra*, must be one upon which a suit might be maintained by the defendant against the plaintiff in the suit, and in addition to the cases specified it is sufficient if it (the counter-claim) be connected with the subject of the suit. In construing this in *Dove v. Hayden, supra*, the court said the counter-claim must be one upon which the defendant might maintain a suit against the plaintiff in the suit. But going further, and giving to the last clause, “if it be connected with the subject of the suit,” the broadest construction possible, and allow and concede it to include counter-claims which embody legal as well as equitable matters or demands, provided such counter-claims be connected with the subject of the suit, will it avail the defendant in this suit?

The claim of the defendant alleged as a set-off is not one upon which a suit might be maintained by the defendant against the plaintiff in the suit. It is purely of legal cognizance, and this is admitted. But is it connected with the subject of this suit? The subject of this suit relates to the origin and ground of the plaintiff's right to recover or obtain the relief asked. That which is connected with, grows out of, or is the direct result of, the transaction which the plaintiff alleges as the ground of demand, may be set up as a counter-claim; but the defendant must be able to trace the origin of his right or claim for relief to the transaction itself, which furnishes the plaintiffs their ground of suit. Now it is clear that the counter-claim alleged by the defendant did not arise out of the transaction set forth as the foundation of the plaintiff's claim, nor is it connected with the subject of the suit.

The claim of the defendant is for money alleged to be due for an interest in a lease sold by Ray and Doty to Hodge, and assigned by them, after it had been disallowed and rejected by the executors, to the defendant. Plainly this is not a matter that arises out of the subject of the suit, or has any connection with the plaintiff's right to obtain the relief asked. The origin of the defendant's right to relief, arising out of this state of facts, cannot be traced to the transaction itself which furnishes the plaintiffs their grounds of suit. It has no connection with it whatever, and cannot, therefore, be allowed as a counter-claim in this suit.

Turning now to the facts as disclosed by the record, we find at the threshold of the defendant's claim a dispute as to the terms of the contract upon which the lease interest was sold by Ray and Doty, the plaintiffs, as the executors of Hodge, claiming that there was no balance due on the contract; that by the terms of the contract Hodge was to pay \$1,500 down, which he did and is admitted, and the remainder was to be made out of the mine. In other words, that Hodge's agreement was to pay a further \$2,500 when it was made out of the mine. On the other hand, Ray and Doty claim, when the work was suspended because the mine could not be operated successfully, that a failure to get out the silver would not defeat the claim. If the silver could have been gotten out, no matter how great the cost, they must do it or pay the balance. The operation of the mine was suspended after the death of Hodge, and it was then that Ray and Doty claimed the balance to be due, and presented the claim to the plaintiffs as executors, and it was rejected. A short time before this suit was commenced, Ray and Doty assigned the claim to the defendant, and it was evidently for the purpose of trying to use it as a set-off. The defendant knew the claim was disputed, and that its settlement could only be effected through the instrumentality of a law action.

Here, then, we have an unliquidated demand, triable before a jury, and in no way connected with the subject of the suit, which the defendant seeks to litigate in a suit in equity, and if, peradventure, the claim should be established, then to use it as a

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set-off. It bears no relation to a debt due, or liquidated demand, which, although arising in a different right, is sometimes allowed in equity as a set-off by reason of circumstances which make it equitable to do so. We do not think such a claim can be used as a set-off to a suit in equity, and as a counter-claim it has no connection with the subject of the suit. Upon the second point it was claimed that whether the alleged balance was overdue or not, the claim could not be assigned after the death of Hodge so as to become a counter-claim against a suit brought by the executors to collect the assets of the estate. But it is suggested that as the matter may be the subject of an action at law, and as the result we have reached takes it out of the record, it is better for us to forbear an examination of that subject.

The decision must be affirmed.

[Filed April 13, 1885.]

MARY C. ADAMS v. JESSE ADAMS.

AND

JESSE ADAMS v. MARY C. ADAMS.

DIVORCE.—A divorce will not be granted when it is apparent that the petitioner's principal object in seeking one is to secure certain property rights.

JOSEPHINE COUNTY. Appeal by Jesse Adams. Bills dismissed.

B. F. Dowell, and *P. L. Willis*, for Appellant.

J. R. Neil, for Respondent.

THAYER, J. — This is an appeal from a decree of the Circuit Court for the county of Josephine. The respondent Mary Adams commenced a suit in that court against the appellant Jesse Adams, to obtain a divorce, and the appellant Jesse Adams commenced a suit in the same court against the said respondent, for the same purpose. At the October term, 1884, of the said court, the two suits were consolidated, and upon the hearing the

12 176
24 418
6* 677
33* 810

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Circuit Court granted a divorce in favor of the said Mary Adams, and dismissed the suit of said Jesse Adams, whereupon the decree appealed from was entered. The parties were married on the 13th day of October, 1875, and lived together, I judge from the proofs and allegations in the two suits, about eight years, when they engaged in a general row and separated. They were middle-aged persons when they married, and each had the remnant of a family. The appellant had a daughter, and the respondent had two sons and two daughters by former marriages. They all tried to live in the same house. The respondent's two sons were grown, and one of her daughters had been, as would appear from the evidence, a prostitute. The appellant had some property at the time of their marriage, which he claims to have put in his wife's name, excepting certain personal property that he insisted upon holding, although the parties are having a spirited contention as to which shall have it.

The grounds upon which each of the parties claimed a divorce were, cruel and inhuman treatment and personal indignities rendering their life burdensome. The respondent alleges in her complaint that ever since March, 1881, until the commencement of her suit, the appellant had habitually conducted himself towards her in a quarrelsome, ill-tempered, and abusive manner, using harsh and insulting language towards her; and during the said time, he treated her children in such an abusive and threatening manner that it became impossible for them to remain at home to live; prohibited her from attending church, although she desired to do so. That about March, 1882, the appellant in a violent and threatening manner drew a shovel, and attempted to strike her with it; and in September of that year assaulted and struck her violently on the arm with some weapon he had in his hand, and then took her team of horses and left and deserted her. That in April, 1883, the appellant circulated false and slanderous reports about her, charging her with having sworn to a falsehood, and with having in her house a woman of ill-repute.

The appellant in his complaint alleges that soon after their marriage the respondent commenced a series of cruel and

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inhuman treatment; also, "infernal indignities," rendering life burdensome to himself and his daughter. He sets out, in separate paragraphs of the complaint, a list of the wrongs he has received from the respondent since their marriage; in the second one, a number of instances in which the respondent had applied opprobrious terms to the daughter; in the third, an account of a scene the parties had in attempting to rescue the respondent's daughter referred to from a life of prostitution and shame; and of an agreement they made, after their efforts had failed, to the effect that said daughter should never be allowed to enter their house again; and of the violation of the agreement by the respondent, alleging therein that in August, 1882, said daughter came to their house, and remained there in spite of the protest of the appellant until after he separated from his wife; that the name of the daughter had been Emma Potter; that when she came to their house at the time last referred to, it had become Emma Cowles; and that the respondent insisted upon her remaining in their family with the respondent's other daughter, and the daughter of the appellant. In the fourth paragraph, the appellant gives an account of the row which resulted in their separation. From his version of it, I would conclude that it was a fight in which the respondent and her children were arrayed against the appellant, and is the same affair in which the respondent alleges that he struck her on the arm with some weapon. The appellant, however, alleges that she received the blow from one of the other combatants while attempting to hit the appellant with a frying-pan. The appellant further alleges in said paragraph of the complaint that, after the affray was over, the respondent ordered him off the premises, and said she never intended to live with him again. In the fifth paragraph of the complaint, the appellant alleges that the respondent had him arrested for an assault and battery, before a justice of the peace; and that said justice, instead of trying him for the assault and battery, bound him over to keep the peace. In the sixth paragraph, the appellant alleges that on the 27th day of October, 1882, the respondent made oath before a justice of the peace that he had been guilty of the crime of larceny, and procured his

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arrest on that charge; but that the justice discharged him. This affair seems to have arisen out of a controversy over the team before referred to. The other paragraphs in the complaint, viz., 7, 8, 9, 10, and 11, relate to their property affairs and the controversy over the said team. The respondent had undertaken to recover the possession of it in an action for that purpose, and had recovered judgment in the lower court for such possession, but the appellant had taken an appeal therefrom. The Circuit Court, upon motion of the respondent's counsel, struck out of said complaint the third, fourth, fifth, sixth, ninth, and tenth paragraphs thereof. Answers were filed to these two several complaints, except to the portion of the appellant's which the court struck out as before mentioned, and proofs were taken in the respondent's case, and the appellant took some depositions; but nearly if not all of them were taken after the expiration of the three months provided in the Civil Code in which to take such proof, and were stricken out on motion of the respondent's counsel.

The only questions the appellants can submit to in this court are: *First*, the rulings of the Circuit Court in striking out of his complaint the said paragraphs referred to; and *second*, the granting the decree of divorce in favor of the respondent. There was, also, something said upon the argument about the court having stricken out a part of the appellant's answer to the respondent's complaint, which, as I understand, is the same matter that was stricken out of the appellant's complaint; but I do not see how it could have been interposed as a defense to the respondent's suit, except so far as it controverted the allegations in her complaint, and he could have had all the benefit of it under a denial for that purpose. So far as the two suits are concerned, I regard them both as entirely destitute of merits. The parties intermarried evidently without any just or proper appreciation of the relations they thereby formed; and if they intended in the outset to conduct themselves towards each other as a husband and wife should, the two sets of children furnished such an element of discord that it would probably have prevented them from observing their mutual promises for any considerable period

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of time. I am of the opinion that the appellant has been much more wronged in the affair than the respondent. He appears to have had some property at the time of the marriage, which the respondent has succeeded in getting the title to in her own name, and now evinces a determination to expel him. Besides, she has kept her own children about her, two of whom were grown men, and who should have been made to depend upon their own resources for a support, and the older daughter had no claim upon the mother, even, much less upon the appellant. These circumstances may not be sufficient to establish a claim for a divorce, but they necessarily were annoying, and, doubtless, occasioned the abuse and ill-temper of which she complains.

The respondent had no ground for a divorce; the appellant's treatment of her children was no cause of complaint. He should have driven away the three referred to unceremoniously; they had no business to foist themselves upon him. Two great, and probably worthless boys, hanging about his place for him to support would provoke anyone; and the girl, Emma Potter Cowles, had long since forfeited all claim to respect or hospitality. There is certainly no ground in that part of the complaint for a divorce. The next allegation, that he prohibited her from attending church, is more serious; but it does not seem to be supported by the testimony. The respondent in her evidence barely alludes to it; says "he opposed my going to church." This amounts to nothing, without further explanation. The drawing the shovel, and attempting to strike her with it, may or may not have been cruel and inhuman treatment. That would depend very much upon the circumstances, the *animus* of the appellant, and the degree of sensitiveness of the respondent. It was not commendable conduct, yet it was not necessarily a sufficient cause for a divorce. The alleged striking of the respondent upon the arm occurred in the general *melee* referred to. The appellant claims that the son hit her with the frying-pan a blow aimed at his head, but whether that is so or not, it happened when quite a desperate fight was going on, in which the appellant seems to have been largely in the minority. The charge that the appellant deserted her is dis-

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proved by the evidence of the deputy sheriff, Chapman. It is quite certain that instead of his deserting her, he was himself driven away from the house. He had made a manful fight against his step-children, but was induced to retire when Chapman requested him to. It doubtless would have been a disgraceful affair if it had occurred between people of culture, but I am not able to see that appellant was to blame. I think his chastisement of the two boys was commendable; that it was no more than a faithful discharge of his duty as a step-father.

It does not seem to me that the respondent has shown by her allegations and proofs that she was entitled to a divorce. Her case has more the appearance of a general scheme to plunder the appellant and clear him out by a proceeding in court that would afford a color of respectability. Nor, upon the other hand, do I think the appellant is entitled to a divorce. It is very apparent that his desire to obtain one is merely to secure certain property rights. He would be able thereby, perhaps, to settle the contention about the team of horses, and secure a third interest in the land he caused to be conveyed to the respondent; but courts should not entertain jurisdiction in such cases for any such purpose. If he has been so imprudent as to allow the title to real property owned by him to be conveyed to the respondent, he has no right to undertake to get it back in that way. The public has an interest in divorce suits, and the court should administer their jurisdiction of that subject in view of the public good as well as of private rights.

The decree appealed from herein divorced the appellant as effectually as though it had been in his favor. He can therefore have no other object in obtaining such a decree in his favor than to secure the property interest referred to. His proceeding is a fraud upon the law. His attempting to have it enforced in his behalf is not to obtain the principal benefit it affords in such cases, but that he may receive the incident attending it. This would be a prostitution of a jurisdiction conferred upon the courts of the State for humane and public purposes, and which cannot properly be invoked for any other. As to the personal property, his right can be settled in an ordinary proceeding at

Points decided.

law. He does not need to sue for a divorce on account of that; and if he has placed the title of the land beyond his reach, he must suffer the consequences. But aside from that, I do not think, in view of all the facts which have been developed, that he is entitled to a divorce. He and the respondent have for a long time been living a kind of cat and dog life; been quarreling, criminating, and recriminating, until finally they have both resorted to the courts to enforce a separation. They neither present the kind of case that a court, in the administration of ecclesiastical law, should take cognizance of. A police court is by far a more suitable tribunal to adjust their grievances. I think, as before suggested, that the appellant is shown to be less in fault; but they are both too much in the wrong to claim the remedy demanded. Nor do I think they have, either, in their allegations and proofs, in view of their condition in life, and the mode in which they have been living, shown such a kind of treatment as the law denominates "cruel and inhuman." Doubtless they have abused each other very much; but it has been rather mutual — very nearly a stand-off; so much so that a decree dissolving the marriage upon any of the grounds alleged in their respective complaints would not be consistent with the spirit of the law upon that subject. I am of the opinion that both of their complaints should be dismissed. This conclusion renders it unnecessary to pass upon the questions of law raised by the striking out of the parts of the appellant's complaint, or any of the other rulings of the Circuit Court.

LORD, J., concurred.

[Filed April 18, 1885.]

DAVID M. GUTHRIE v. JAMES IMBRIE.

PRINCIPAL AND AGENT—CONTRACT—CORPORATION.—When a person executing a contract merely adds to the signature of his name the word "sec.," "agent," "trustee," without disclosing the name of his principal, he is personally bound.

Argument for Appellant.

- Id. — CORPORATE SEAL — PROMISSORY NOTE. — But where a promissory note is signed "A B, Pres't," and "C D, Sec. G. M. Co.," and on its face is plainly stamped an impression of a seal bearing the words "Granger Market Co.," it must be assumed that the seal was put there to serve some purpose. Such an instrument indicates an intention to bind the company and not the individuals.
- Id. — EVIDENCE — AMBIGUITY — PAROL PROOF. — *Seem*, that between the original parties, when the instrument is ambiguous or uncertain upon its face, and the matter is in doubt whether the principal or agent is liable, such uncertainty may be removed by extraneous proof.
- Id. — EFFECT OF CORPORATE SEAL. — (Per WALDO, C. J., dissenting.) — The sole purpose of a corporate seal is to give full faith and credit to the writing to which it is appended. Where a promissory note is signed by the president and secretary of a corporation as such, without other words indicating that the note is the act of the corporation, affixing the seal cannot be construed into a declaration that they signed on behalf of the company.

WASHINGTON COUNTY. Plaintiff appeals. THAYER, J., having been an attorney in the case, did not sit.

The court being equally divided in opinion, the case stands affirmed under the statute.

The facts are stated in the opinion.

Thos. H. Tongue, for Appellant.

The liability of J. J. Imbrie is not in question. Whatever effect the addition to his signature and the impression of a seal may have as to his liability, it does not affect the liability of James Imbrie. That will be determined by the contract as signed by him. The decision of the court, therefore, in holding him personally liable upon the face of the contract was in accordance with a long line of authorities. (*Tucker v. Bass*, 5 Mass. 164; *Foster v. Fuller*, 6 Mass. 58; *Fowler v. Shearer*, 7 Mass. 14; *Buffum v. Chadwick*, 8 Mass. 103; *Sumner v. Williams*, 8 Mass. 162; *Mahew v. Prince*, 11 Mass. 53; *Brinley v. Mann*, 2 Cush. 339; *Packard v. Nye*, 2 Met. 47; *Simonds v. Heard*, 23 Pick. 120; *Seaver v. Coburn*, 10 Cush. 324; *Barker v. Mechanics' Fire Ins. Co.* 3 Wend. 94; *Moss v. Livingston*, 4 N. Y. 209; *De Witt v. Walton*, 9 N. Y. 571; *Sturdevant v. Hull*, 59 Me. 172; S. C. 8 Am. Rep. 409; *Tannatt v. Rocky Mountain Bank*, 1 Colo. 278; *Burlingame v. Brewster*, 79 Ill. 515; S. C. 22 Am. Rep. 177, and n. on 186; *Orchard v. Binninger*, 51 N. Y. 652; *Hall v. Bradbury*, 40 Conn. 32;

Argument for Respondent.

Lincoln v. Orandall, 21 Wend. 101; *Auburn City Bank v. Leonard*, 40 Barb. 119; *Lee v. M. E. Church*, 52 Barb. 116; *Hall v. Cockrell*, 28 Ala. 507; *Sayre v. Nichols*, 5 Cal. 487; *Titus v. Kyle*, 10 Ohio St. 445; *Blakely v. Bennecke*, 59 Mo. 193; *Dennison v. Story*, 1 Oreg. 272.) Defendant's intention is not material except as expressed. (*Summer v. Williams*, *supra*.) If doubtful, he is bound. (*De Witt v. Walton*, 9 N. Y. 571.) Plaintiff's knowledge, if he had any, that defendant was acting for another does not discharge the latter. (*Hastings v. Lovering*, 2 Pick. 221; *Sturdevant v. Hull*, *supra*.) After deciding that the notes were those of James Imbrie, on their face, the court permitted parol testimony to be given, to discharge him. This ruling is not supported by any authority that we have seen. Parol evidence was admitted to show the intent of defendant not to be bound by his contract. This was not admissible. (1 Greenl. Ev. §§ 275, 277, 281; *Sturdevant v. Hull*, *supra*; *Tannatt v. Rocky Mountain Bank*, *supra*; *Smith v. Caro*, 9 Oreg. 278.)

R. Williams, for Respondent.

The impression of the seal of the Granger Market Company upon the notes, and the additions to the name of James Imbrie, of the word "president," and to the name of J. J. Imbrie, of the words, "sec'y G. M. Co.," show the notes were intended to be the act of the corporation, rather than the act of James and J. J. Imbrie, or the joint act of the three. (*Hovey v. Magill*, 2 Conn. 680; *Means v. Swormstedt*, 32 Ind. 87; *Angell & A. on Corp.* § 224.) But if it is doubtful from the face of the notes who the makers were intended to be, or who it was intended to bind thereby, or what the true meaning, in any other respect, may be, then parol evidence of the circumstances surrounding the parties under which the notes were made is admissible for the purpose of enabling the court to determine who the makers were. (1 Daniel Neg. Inst. § 418; 2 Wharton Ev. §§ 937, 951, 1061; *Abbott Trial Ev.* p. 402, § 26; *Hood v. Hallenbeck*, 7 Hun, 362; *Watervliet Bank v. White*, 1 Denio, 608; *Haile v. Peirce*, 32 Md. 327; *Babcock v. Beman*, 11 N. Y. 200; *Bank of N. Y. v. Bank of Ohio*, 29 N. Y. 619.)

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LORD, J.— This action was commenced to recover the amount due on two promissory notes. As both notes are alike in form and purport, the copy of the following will be sufficient for the purposes of this case:—

“\$500.

PORTLAND, OREGON, July 8, 1875.

“For value received, we promise to pay to David Guthrie, or order, ninety days after date, five hundred dollars in U. S. gold coin, without interest.

[Signed]

“JAMES IMBRIE, Prest.

[SEAL.]

“J. J. IMBRIE, Sec. G. M. Co.”

On each note is the impression of a seal, containing the inscription, “Granger Market Co., Portland, Oregon, November 4, 1874.” The defendant demurred to the complaint, for insufficiency of facts stated, and the demurrer was overruled. The defendant J. J. Imbrie was not served, and did not appear. The defendant James Imbrie in his answer pleaded that he executed the notes in question as president of the Granger Market Company, a domestic corporation, for a debt due the plaintiff from it, without other consideration, and the plaintiff received the notes as the notes of the Granger Market Company. The reply denied all the material allegations of the answer. Upon issue being thus joined, a trial was had, which resulted in a verdict and judgment for the defendant.

By the record it appears that all the questions we are required to consider, both in respect to the testimony received and that offered and ruled out, as well as the objections to the charge of the court to the jury, and to the special instructions asked and refused, may be resolved into two: *First*. Are these the individual notes of the defendants, or the notes of the Granger Market Company? *Second*. Are the notes so ambiguous or unintelligible in their language or terms that no rational interpretation can be given of their meaning, according to the canons of sound construction, without the aid of extraneous proof? To ascertain the proper interpretation of a written contract, the rule adopted by the courts is to give full effect to all the terms in which the contract is expressed. The words used are to be taken in their plain, ordinary, and usual sense, unless their

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meaning be restricted by usage or the context. The rule assumes that the language employed is inserted in the contract for some purpose, and is intended to have some meaning and effect. This being so, the intention of the parties is to be discovered from the whole contract. The question, therefore, whether a bill or note has been executed by a party in his individual or official capacity must be determined from the intent as collected from the whole instrument, however inartificially drawn, or informally the intention may be expressed. "If, from the nature and terms of the instrument," says Judge Story, "it clearly appears, not only that the party is an agent, but that he means to bind his principal and to act for him, and not to draw, accept, or indorse the bill on his own account, that construction will be adopted, however inartificial may be the language, in furtherance of the actual intention of the instrument. But if the terms of the instrument are not thus explicit, although it may appear that the party is an agent, he will be deemed to have contracted in his personal capacity." (Story Ag. § 153.) Again he states the rule thus:—

"A liberal construction is ordinarily adopted in the exposition of commercial instruments, for the purpose of encouraging trade, and to meet as far as possible the ordinary exigencies of business, which require promptitude, and rarely admit of deliberate examination of the true force of words. In furtherance of this policy, if it can upon the whole instrument be collected that the true object and intent of it are to bind the principal, and not to bind the agent, courts of justice will adopt that construction of it, however informally it may be expressed." (Story Prom. N. § 69.)

This rule of construction is clear, easily understood, and designed to promote the ends of justice, but, owing to the different forms and modes of expression used in written contracts, there is often found some difficulty in applying its principles. In executing a note or other written instrument, in order to discharge himself from personal liability, the agent must adopt such form of expression, or use such language as will show the writing to be the act of the corporation and intended to bind it.

"It seems," says Parker, J., "to be a general principle that the signer of any contract, if he intends to prevent a resort to himself personally, should express in the contract the quality in which he acts." (*Mayhew v. Prince*, 11 Mass. 54.)

Leaving out of consideration the seal upon the note in question, there is nothing in its terms or language which purports to bind the corporation or to be a contract of the corporation. The language is "we promise," etc. The words "prest." and "sec. G. M. Co.," attached to the signatures are merely *descriptio personarum*. They do not disclose the name of any principal, and, in fact, are too indefinite, without the aid of extraneous proof, to designate any corporation. When a person merely adds to the signature of his name the word "sec.," "agent," "trustee," without disclosing the principal, he is personally bound. This is undoubtedly the ordinary rule, and supported by much authority. In *Scott v. Baker*, 3 W. Va. 290, the court say:—

"The president and treasurer, together or separately, may have had authority to make the notes of the company, but in this instance the note is not executed for the company, or in the name of the company, and the addition of president and treasurer to their names cannot have the effect to make it the note of the company."

(See also *Hays v. Crutcher*, 54 Ind. 261; *Tucker Manuf. Co. v. Fairbanks*, 98 Mass. 102; *Sturdevant v. Hull*, 59 Me. 172; *Burlingame v. Brewster*, 79 Ill. 516; *Tannatt v. Rocky Mountain Bank*, 1 Colo. 279; *Towne v. Rice*, 122 Mass. 75; *Chamberlain v. Pacific Wool G. Co.* 54 Cal. 106; *Cahokia v. Rautenberg*, 88 Ill. 220; *Bank v. Cook*, 38 Ohio St. 444; *Ewell's Evans Ag.* 248, notes; 1 Daniel Neg. Inst. § 403.)

But the character in which the signatures were attached to the note in hand, and the intent, as discoverable from that instrument, whether to bind the corporation or the individuals signing it, is relieved of much difficulty when the seal is taken into consideration. On the note is an impression of a seal bearing the words "Granger Market Co." It must be assumed that the seal bearing these words, plainly stamped upon the

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note, was put there to serve some purpose, and to give some effect to the instrument, and certainly it tends to explain the purport and purpose of the words "prest." and "sec. G. M. Co." attached to the signatures, and to indicate the quality or capacity in which such signers of the note acted. In *Means v. Swormstedt*, 32 Ind. 87, where the secretary of an incorporated company gave a promissory note, using the words "we promise to pay," etc., and signed it with his own name, with "sec'y" affixed, and impressed thereon the seal of the corporation bearing the words "Neal Manufacturing Co., Madison, Ind.," it was held that he was not personally liable thereon. The court say:—

"The seal of the company is in the hands of the secretary. It is his duty to affix it to papers executed by the corporation. The presumption is, then, that he did, after signing his name and adding his office, affix the seal of the corporation, which, containing upon its face the proper designation of the corporation, was a signing of their name."

And again:—

"It can be a matter of no import how a name is affixed to a paper, whether written with ink or pencil, printed or stamped. The intent in placing it there must control, and where that intent is evident, effect should be given to it. . . . The note was plainly intended to read as executed by 'Wm. B. Swormstedt, Sec'y Neal Manufacturing Co., Madison, Ind.'; and if effect be given to the addition to the name, the corporation must be bound."

It will be noticed in this case that the plural expression "we promise" is followed by a single signature, which is more consistent with an intent to bind the company, who are many, than the individual. But certainly little importance was attached to this fact by the court, as there is no reference or allusion to it, although it may have received consideration in connection with other and stronger *indicia*, upon which stress was laid and deemed controlling in determining the intent with which the note was executed. It is, however, this respect in which the note in that case is distinguishable from the one before us.

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Here the plural expression "we promise" is followed by two signatures, which is as consistent with the intent to bind themselves individually as to bind the company, unless the effect of the seal with its designation of the company excludes the intent to bind personally.

In the particular just noted, more nearly the counterpart of this case under consideration is that of *Dutton v. Marsh*, Law R. 6 Q. B. 361, where a different conclusion was reached as to the effect of merely affixing the seal. There the note was:—

"We, the directors of Isle of Man Slate & Flag Company, limited, do promise to pay John Dutton, Esq., the sum of 1,600£, sterling, with interest at the rate of six per cent until paid, for value received.

"RICHARD J. MARSH, Chairman.

"JOSEPH HIGGINS.

"SAMUEL BRONDBEERT.

"HENRY JOHNSON.

"Witnessed by

[L. S.]

"LESLIE LOCHORT."

In the corner of the note the company's seal was affixed, with "witnessed by Leslie Lochort." The question was whether the putting of the company's seal on the note was not equivalent to saying "on behalf the company." In delivering the judgment of the court, Cockburn, C. J., said:—

"But this case was rendered doubtful by the fact of the corporate seal being affixed to the document. It does not purport in form to be a promissory note, made on behalf of or on account of the company. So far as the written portion of it goes, it is totally without such qualifying expression, but some doubt was raised in my mind whether the affixing of the seal might not be taken as equivalent to a declaration in terms, on the face of the note, that the note was signed by the persons who put their names to it on behalf of the company, and not on behalf of themselves. But, on consideration, I agree with my learned brothers this effect cannot be given to placing this seal of the company upon the note. It may be that it was simply for the purpose of

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ear-marking the transaction, or, in fact, showing as to the directors that, as between them and the company, it was for the company they were signing the note, and that it was a transaction in which the proceeds to be received upon the note would operate to the benefit of the company; but there is no case that goes to the extent of saying that the affixing of the seal, when the parties do not otherwise use terms to exclude their personal liability, would have that effect. We think it is going too far to say that the mere affixing of the seal has that effect."

It does not appear from this case that the corporate seal was attached with an impression of the name of the company, as in *Means v. Swormstedt*, *supra*, or as in the case before us. There was a seal affixed, but whether it contained a designation of the company or some other device is not disclosed. If the seal did bear an impression of the name of the company, the case is only distinguishable from *Means v. Swormstedt*, *supra*, in the particular already noted to the case under consideration. But we apprehend the seal did not bear an inscription of the name of the company; and if this view is correct, mere affixing of the seal to the note in that case was not a signing of the company's name, within the reason of *Means v. Swormstedt*, but, as was said, simply for the purpose of ear-marking the transaction; and therefore was not the use of such terms by the parties as would have the effect to exclude their personal liability. But in our judgment, the note before us does fall within the reason and principle decided in *Means v. Swormstedt*. It was signed by "James Imbrie, Prest.," and "J. J. Imbrie, Sec. G. M. Co.," and the seal is affixed to it bearing in plain characters the inscription "Granger Market Co." The rule of construction requires us to give effect to every word, if possible, and if any effect or significance is to be given to the name of the company, plainly stamped upon the paper or note, we know that the words "prest." and "sec. G. M. Co." attached to this signature, instead of being mere surplusage, or useless appendages, are susceptible of being made operative consistently with the terms of the whole instrument, and mean that these persons are such officers of that company, and are intended to indicate the official

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character in which they acted when the note was executed. We know that these words were intended to serve some purpose; and what other purpose can they serve, taking into account the corporative name, which is consistent with the terms of the promise, but to indicate their official character, and that they acted on behalf of the company, and not on their individual behalf? We know that it is the duty of the proper officer, generally the secretary, to affix the seal to the papers executed by the corporation, and when, after signing his name and adding his office, he affixes the seal of the corporation, which, as the court say in *Means v. Swormstedt*, *supra*, "containing upon its face the proper designation of the corporation, was a signing of the company name."

In *Scanlan v. Keith*, 102 Ill. 640, where the note sued upon was, "ninety days after date we promise to pay to the order of John Scanlan," etc., and was signed underneath at the right hand "Sam'l L. Keith, Prest. Chicago Ready Roofing Co.," and at the left hand, at the usual place for the signature of an attesting witness, was signed "W. H. Kretzinger, Sec'y," with the seal of the "Chicago Ready Roofing Company" attached, it was held to be the note of the company. In delivering the opinion of the court, Scott, J., said:—

"It is inconceivable a person familiar with the business transacted by a corporation, taking a note executed by its officers under its corporate seal, should believe he was obtaining the individual note of the officers whose names are attached to it. It needs no extrinsic evidence to show that such a note is the obligation of the corporation. Such is the common understanding, from what appears upon the face of the instrument itself. A most unreasonable conclusion it would be to hold that a secretary of a corporation, who attests such an instrument by his signature and the corporate seal, thereby becomes a joint maker. That is precisely the case here. Kretzinger was secretary of the corporation, and for aught that appears in this record he did nothing more than attest the execution of the note and affix the seal of the corporation. Should that act by judicial construction be held to constitute him a joint maker of the instru-

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ment to which his name is attached, it would be to make a note for him, which the party himself certainly never had the remotest intention of doing. The same reasoning applies with equal force to the defendant, who made the note as president of the corporation, in connection with the secretary, using the seal of the corporation."

It may often happen in the haste incident to the prompt execution of business, or through inadvertence, being more intent on the substance than the form, that merchants or others engaged in business transactions express themselves in their writings informally, and without precision of language, and hence the liberal policy of allowing the intent of the parties to govern, as discoverable from the whole instrument. But we do not think it is usual for persons engaged in business transactions, when acting for themselves and not in a representative capacity, to attach to their signatures such designations of office, and to attest the same with the seal of the corporation bearing an impression of its corporate name. On the contrary, we believe when such things are done, and the instrument is consistent and operative with such *indicia*, they are more properly referable to the company than the persons as individuals who signed the instrument.

We think the notes in question were executed on behalf of the corporation, and not personally, and were the notes of the company. It seems, however, that the court below, in overruling the demurrer, expressed the opinion that the notes were the notes of the defendant, and not of the corporation; but evidently, from the testimony received and objected to, and the instructions given and refused, as disclosed by the bill of exceptions, the court considered the notes ambiguous on their face, and evidence necessary to fix their true character. No other view is consistent with the course pursued by the court; for if the notes are not uncertain on their face, as we think, there exists no necessity for resorting to parol proof. The case has been tried on this basis, and the question of admissibility of such evidence been presented and discussed to us. But it is not necessary for us to go into much examination of this subject, or review the decisions upon it. It is sufficient for us to state that

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our impression is, as between the original parties, when the instrument is ambiguous or uncertain upon its face, and the matter is in doubt whether the principal or agent is liable, such uncertainty may be removed by extraneous proof. (*Haile v. Peirce*, 32 Md. 331; *Klosternann v. Loos*, 58 Mo. 292; *Hood v. Hallenbeck*, 7 Hun, 367; *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. 326; *Metcalf v. Williams*, 104 U. S. 97; 1 Daniel Neg. Inst. § 418; 2 Whart. Ev. 1058-1061.)

The bill of exceptions discloses that the persons signing the notes as "prest." and "sec. G. M. Co." were such officers of the corporation, and authorized to execute the notes; that they executed and signed the notes as such officers, and the secretary affixed the seal, for and on behalf of the corporation; and that the consideration for the notes was cattle purchased by the company, and were given by the company, and received as such in payment of the same. Upon the theory that it was doubtful from the face of the notes whether they were intended to operate as a personal or corporate engagement, we do not discover any error. I think, therefore, the judgment should be affirmed.

WALDO, C. J. — The case of *Dutton v. Marsh*, Law R. 6 Q. B. 361, can hardly be distinguished from the present. The court in that case argued that, assuming the seal not to be affixed, the note was clearly the note of the individual signers. If, then, it became the note of the company by reason of the seal being affixed, affixing the seal must be the equivalent of a declaration that the directors signed the note on account of or on behalf of the company. And they say, "we think it is going too far to say that the mere affixing the seal has that effect." So in this case, assuming the seal not to be affixed, the note is the note of the defendants, and consequently, as in *Dutton v. Marsh*, affixing the seal cannot be construed into a declaration that they signed on account of or on behalf of the company. If the seal shall have the effect to make the company a party at all, there are grounds for saying that it shall make it a several obligor. (Daniel Neg. Inst. § 34, citing *Rankin v. Roler*, 8 Gratt. 63.) A note under seal is a specialty, and not a negotiable promissory

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note. (*Clark v. Farmers' Co.* 15 Wend. 256; *Hopkins v. Railroad Co.* 3 Watts & S. 410; *Conine v. Junction & B. R. Co.* 3 Houst. 288.) But in this case a function seems to be claimed for the seal hitherto unknown to the law. "The sole purpose of the seal is to give full faith and credit to the writing to which it is appended." (*U. S. Bank v. Dandridge*, 12 Wheat. 93; *Holmes Com. Law*, 272.)

It is not claimed in this case that the seal authenticates the note, and thereby puts it under seal. But if it does not do this, it performs no function appertaining to the office of a seal. The law declares the function and effect of a seal, and the court cannot say that it shall perform some other office. It can make no difference what the impression may be, because the seal does not prove itself, and the effect of any impression, when proved to be an impression of the corporate seal, must be precisely the same in all cases. It is necessary, then, and the endeavor is, to construe the act of affixing the seal not as an act of authentication, but as a declaration in parol. To do this the seal, as a seal, must be discarded, and extrinsic evidence admitted to show the intention. The words "The Granger Market Co." were but a part of the impression of the seal of the Granger Market Company, and, as such, go to make up the identity of its seal, and nothing more, as any device substituted for them would have done. If the intention were not to impress the seal, but these words alone, on the paper, that intent is a fact to be proved to contradict the presumption of law created by the act of impressing the seal. The moment this is attempted we come in conflict with the rule that "the liability of the defendants, as drawers of a negotiable instrument, must be determined from the instrument itself." (*Tucker Manuf. Co. v. Fairbanks*, 98 Mass. 104.) "He who takes negotiable paper contracts with him who on its face is a party thereto, and with no other person." (*Met. Cont.* 108.) "Is it not a universal rule," says Lord Ellenborough, *Leadbitter v. Farrow*, 5 Maule & S. 349, "that a man who puts his name to a bill of exchange makes himself personally liable, unless he states on the face of the bill that he subscribes it for another, or by procuration of

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another, which are words of exclusion? Unless he *plainly* says 'I am the mere scribe,' he becomes liable." "Not quite a universal rule," say the Supreme Court of the United States; but the rule remains.

It is well settled that whether a principal or his agent is the party liable upon a promissory note or bill of exchange, must be ascertained from the instrument itself. All evidence *dehors* the instrument is to be excluded. (*Barlow v. Congregational Soc.* 8 Allen, 460; *Brown v. Parker*, 7 Allen, 337; *Slawson v. Loring*, 5 Allen, 342; *Rendell v. Harriman*, 75 Me. 497.) "If it is left ambiguous on the face of the instrument whether they have so signed it, the construction most against the person signing should prevail." (Crompton, J., in *Deslandes v. Gregory*, 2 El. & El. 609.) In many of the States there seems to be too slender a union between principle and practice. The result is that uncertainty and confusion which usually follows departure from principle.

In *Means v. Swormstedt*, the seal, as viewed by the court, showed that William M. Swormstedt was secretary of the Neal Manufacturing Company. "The note was plainly intended to read as executed by Wm. M. Swormstedt, Sec'y Neal Manuf. Co., Madison, Ind."; and this, it seems, was thought sufficient to create a corporate obligation. The authorities are certainly nearly all the other way: It should seem that if the seal cannot have effect as a seal, it cannot have any operation at all, the exclusion of extrinsic evidence leaving it where it was left in *Dutton v. Marsh*. It follows that the defendants ought to be held liable.

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[Filed April 18, 1885.]

SAMUEL ARCHER v. PLESILY LAPP.

CONVEYANCE—UNDUE INFLUENCE—CONSIDERATION—FRAUD.—Inadequacy of consideration may be so gross that it shocks the conscience, and furnishes satisfactory evidence of fraud.

Id.—FRAUDULENT REPRESENTATION.—Obtaining the property of another under a form of purchase, without paying any consideration therefor, and with a design of acquiring it for nothing, is fraudulent in itself. Misrepresentation and deception in such a case will be implied.

COOS COUNTY. Defendant appeals. Affirmed.

The facts are stated in the opinion.

William R. Willis, for Respondent.

Where inadequacy of consideration or undue influence is joined to imbecility or weakness of mind arising from old age, sickness, intemperance, or other cause, equity will set aside the transaction at the suit of the injured party. (See *Bigelow Fraud*, pp. 281–287; *Allore v. Jewell*, 94 U. S. 506, 511, 512; *Cowell v. Cornell*, 75 N. Y. 91; *Clarke v. Sawyer*, 3 Sand. Ch. 351; *Brice v. Brice*, 5 Barb. 533; *Moore v. Moore*, 56 Cal. 89.)

J. M. Siglin, for Appellant.

In order to set aside a deed for undue influence, it must be shown that grantor's mind was weak, that undue influence was exerted, and that it was the undue influence which caused the execution of the deed; that it was not grantor's free act. (*Bigelow v. Leabo*, 8 Oreg. 147; *Cudney v. Cudney*, 68 N. Y. 148, 151; *Gardiner v. Gardiner*, 34 N. Y. 155; *Clapp v. Fullerton*, 34 N. Y. 190; *Brick v. Brick*, 66 N. Y. 144; *Chil. Aid Society v. Loveridge*, 70 N. Y. 387.)

THAYER, J.—This appeal is from a decree rendered in a suit commenced by Samuel and Rachel Archer, the respondents herein, against Plesily Lapp and Stephen Lapp, to set aside a deed executed by one William Archer in his lifetime to the appellant Plesily Lapp. The said William Archer was the

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father of the respondent. He was residing in Coos County at the time of his death, which occurred in January, 1880. The deed referred to bears date December 7, 1878, and purports to have been executed and acknowledged on that day, but was not recorded in the clerk's office of said county until the 8th day of March, 1879. The premises included in the deed are 160 acres of land, situated in Coos County, and constituted the home of the said William Archer for a number of years prior, and until the time of his death. It is alleged in the complaint, and the proofs tend to show that at the time of the execution of the deed the grantor was eighty-eight years old; that he had been for some time prior thereto infirm, in consequence of extreme age; had been afflicted with dizziness at times; was childish, and was subject to sick spells, and frequently was cross and irritable. His son, said Samuel Archer, resided for some time with his father, and claims to have taken care of him generally for several years; to have furnished him with money at times, and nursed him in his sickness. The son had a wife and child, and they all lived together upon the premises in question for some time. But the old gentleman having conceived a dislike to the son's wife, the latter subsequently built another house for himself and family, where he remained until the 5th day of July, 1878, when he moved to California, after which Mrs. Lapp from time to time assisted the old man and nursed him during his sick spells. He appeared to have some means, money, and cattle, aside from the land.

The son Samuel Archer testified in his deposition given in the suit, that his father had \$400 he had put away; that he had that amount when he left for California; and after he left, that he drew some \$300 of his money, out of which he paid some of the son's debts. The testimony of his having the \$400 appears to have been hearsay, rather, and besides, it does not agree with other portions of the son's testimony; that he let him have the money to enter his land, and supported him for twelve years. But that the father drew the \$300, and that he had cattle which he sold from time to time for money, was satisfactorily proved.

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The deed in question was drawn up and signed at Coos City, which is situated a few miles above, on the slough near which said William Archer lived. According to the testimony of Mr. D. L. Watson, an attorney residing at said Coos City, said William Archer came to his place on said 7th day of December, 1878, and requested him to draw the deed; that he did so, and it was then signed by the grantor, and duly witnessed; and Mr. Watson filled out the acknowledgment, and gave the deed to said Archer to go and acknowledge it before Mr. Horswill, a justice of the peace in the neighborhood; and that he took it and left. The grant was to Mrs. Lapp, and purports to have been in consideration of \$500 received from her. She was not present when the deed was signed. It appears to have been acknowledged before Mr. Horswill, but he testified positively that he did not on the 7th day of December, or at any time, take the acknowledgment of said William Archer to a deed conveying the said premises to Mrs. Lapp. The signature, however, purporting to be that of Frederick Horswill appears, from the testimony of witnesses, and from a comparison of his handwriting with other documents shown in evidence, to have been his, and he evidently took the acknowledgment, or at some time appended his name thereto without having taken it.

The only evidence of the purchase and sale of the premises is that of Mrs. Lapp, and that is very meager. She testified "that she bought a piece of land from him, William Archer; he went to Coos City in the morning, and came back in the evening with the deed, and I received it that day, and paid him the money for it." She was asked what part did Stephen Lapp, her husband, take in purchasing or procuring the deed for the land, and answered, "he had nothing to do with it; he didn't know anything about it for about three months after; he never saw the deed until he saw me hand it to the assessor"; and also testified that she made an effort to keep a knowledge of the fact that she had the money she paid for the land from her husband. She was interrogated as to where she got the \$500 which she claimed to have paid for the land, and attempted to explain the fact; but her testimony upon that point was vague and unsatis-

factory. The circumstances of her affairs showed pretty conclusively that she had no such amount of money at the time, and tended very strongly to show that she was impecunious. She and her husband were present during the last sickness of William Archer, and at the time of his death, and seemed to have had charge of his affairs. His death occurred only a little more than a year after the execution of the deed, and there was only found among his effects the sum of \$8.37; and there was no evidence in the case to justify the conclusion that at any time after the pretended payment to him of the \$500 he had any such amount of money, or any more money than he was shown to have had and received from other sources. I think we may safely conclude from all the evidence in the case that Mrs. Lapp never paid a cent for the land, and that the pretended payment of \$500 therefor is a mere subterfuge. The whole transaction was a clandestine affair, and well calculated to excite suspicion as to its honesty and good faith. To my mind, it was a clear attempt to swindle the old man out of his land and defraud the respondents of their inheritance. The whole surroundings of the case indicate that Mrs. Lapp controlled the whole matter. Her husband, very evidently, had no voice in the community affairs of his family, and William Archer, in his helpless and dependent condition, was wholly powerless in her hands. She had full opportunity to manage him, and her statements and admissions to other parties, and the result, show beyond question that she did manage him completely. Mrs. Agnes Richards testified to the following occurrence:—

“Question 2. Were you acquainted with William Archer during his lifetime? Answer. I was; knew him from eleven to twelve years. Q. 3. Were you ever present at Mr. Archer's house when he was sick? A. I was there with my husband; Mr. Archer sent for us. Q. 5. Did Mr. Archer think he was going to die? A. We all thought so; he was very sick. . . . A. 6. . . . Mrs. Lapp was going from one room to another. She came in the room I was in, and went to a sack that was hanging by the side of the wall and took out something wrapped

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in a cloth. She came to me and held it out in her hand, and asked me if I did not wish I were in her shoes. She went to the bed-room, to the old man, with what she had. She told me afterwards it was money. And when we were leaving the house the old man began to cry, and he cried so loud that we heard him out in the meadow; and when we were coming home, Mrs. Lapp told me what she had in that cloth was money, but how much I do not know. Q. 9. Did Mrs. Lapp say anything to you about what she intended to take, or would take? A. When he was crying she said: 'What trouble the old thing is; I would take every cent of money from him if I could.'"

And Mrs. Martha J. Hall testified to statements made by Mrs. Lapp, in a conversation she had with her, to the same effect. The following is the substance of her testimony:—

"I had a conversation in December, 1879, with her. She said she had wormed the old man's land out of him, and she intended to have Sam's yet. Question 4. State the rest of the conversation, if there was anything else. Answer. She said the old man came to her house in the summer and demanded seventy-five dollars, and she had taken his cane out of his hand and larruped him down the hill with it. Q. 6. Do you know what place she referred to when said she had wormed the old man's place out of him? A. I suppose she referred to the place the old man had across the slough. Cross-examination—cross-question: To whom did she refer when she said she would have Sam's land yet? Answer. I suppose she meant Sam Archer, as she was speaking of the old man."

Such statements ordinarily should be received with caution, and we would be inclined to attach no great importance to them in this case, were they not so fully corroborated by the general circumstances disclosed by the evidence. It appears also, from the testimony, that subsequently to the date of the deed the old man executed, at different times, two several wills, bequeathing his property to Mrs. Lapp. There were some circumstances in the case which, possibly, tended to alienate William Archer from his son Samuel Archer, such as his fancied dislike to Samuel's wife, and Samuel going to California; but there was

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nothing to show why Mrs. Lapp should have been made a legatee in those wills. She had, it is true, attended upon him in his sickness, and extended to him kind assistance; but he remunerated her for it in money he paid her, and clothing which she obtained upon his account; and, besides, it may be inferred from the testimony of Mr. D. L. Watson that Mrs. Lapp had charged William Archer for waiting upon him and taking care of him when he was sick. That fact appears from the proceedings in the little lawsuit they had in May, 1879. She set it up in her answer as a counter-claim. He obtained a small judgment against her, and then advanced her money to pay off the costs. He evidently regarded the transaction through which the deed was obtained as a piece of chicanery. He bought a pistol, and when asked what he intended to do with it, stated that he had bought it to kill the parties who had robbed him out of his property. He was asked what he meant, and replied that he meant Steve Lapp and his wife; said they had robbed him out of his land and his money and everything he had. It appears also that Mrs. Lapp artfully avoided it being known that she had secured any deed to the property. No surrender of the possession of the land was had, or seems to have been expected. The deed was acquired, and three months thereafter was quietly put upon record; and the beneficiary under it then patiently waited the occurrence that would prudently justify the assertion of the title, the old man's death, which she showed no disposition to have postponed longer than possible—at least, the witnesses who were present in his last sickness testify that she objected to sending for a physician, saying "it was no use, and she would have to pay the bills, as everything belonged to her."

It is unnecessary to animadvert upon the proofs in this case. They may have been exaggerated, but if they are half true, the transaction upon the part of Mrs. Lapp was an infamous scheme to plunder a poor old dotard of his property and effects. The suit to set aside the said deed is founded upon the grounds that the deed was obtained by undue influence, and that there was no consideration for its execution. The pleader went further, and

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alleged specific representations claimed to have been made by the grantee in the deed, in order to induce the grantor therein to execute it; but no attempt seems to have been made to prove such representations, and that part of the complaint is wholly unsustained. We think, however, that there is sufficient in the complaint to constitute a cause of suit aside from the special matter referred to, and that a case has been made out for setting aside the deed, if the evidence is sufficient to establish such a character and degree of influence as will authorize it in accordance with the rules of equity. What peculiar arts, persuasions, or representations were resorted to in the case, in order to induce William Archer to deed the land in question to Mrs. Lapp, does not appear, and unless the court can infer from the facts that were proved that the execution of the deed was secured by improper means, it is powerless to grant relief; but from the facts and circumstances of the case, and the statements and admissions of the parties claiming under the deed, a court of equity would necessarily conclude that it was procured through fraud. Inadequacy of consideration may be so gross that it shocks the conscience, and furnishes satisfactory and decisive evidence of fraud. (Pom. Eq. Juris. § 927.) Here there was only the pretense of a consideration. One was probably promised, and doubtless expected, but the possession of the deed was obtained without any intention of paying anything for the land.

It mattered not what particular influence was employed to effect the object and purpose; it was illegal and improper; it was used to accomplish the end designed, and the law adjudges the transaction fraudulent—infers from the facts established by the proofs that the nature of the influence which produced the result was of the character mentioned. The fact that one person has obtained the property of another, under a form of purchase, without having paid any consideration therefor, and with a design of acquiring it for nothing, is fraudulent in itself. Misrepresentation and deception in such a case will be implied, as they are necessary concomitants of the act. It is unlike a case to set aside a deed, for undue influence, where there is no positive element of fraud apparent from the intrinsic nature and

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subject of the transaction. There the courts will not interfere, although mental weakness and slight inadequacy of consideration are proven, unless it be shown that such an influence was exerted as to prevent them from judging and acting independently in the matter. In this case Mrs. Lapp dealt with a person whose mental capacity was evidently impaired. She obtained the deed to the land under suspicious circumstances. Her statements and admissions, which the proofs show that she made, concerning the affair, rendered it incumbent upon her part to establish that she paid a full and adequate consideration for the property. She failed to confirm that fact; and the transaction must be regarded as fraudulent. The decree, therefore, of the Circuit Court will be affirmed.

LORD, J., concurring.

[Filed April 16, 1885.]

ALICE M. AIKEN v. GEO. E. AIKEN ET AL.

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WIDOW—CONSTRUCTION OF STATUTE.—Under section 28, chapter 17, of the Misc. Laws, a widow is entitled to remain in the dwelling-house of her husband one year after his death without being chargeable with rent therefor. Said section has not been repealed or modified by section 1094 of the Civil Code.

FORCIBLE ENTRY AND DETAINER—EJECTMENT.—But neither forcible entry nor ejectment lies to enforce such right.

LD.—LEASEHOLD ESTATE.—Such right applies only to lands of which the husband was owner, and not to a leasehold estate.

JUSTICES OF THE PEACE—JURISDICTION.—Justices of the peace have no jurisdiction in cases where title to real estate comes in question.

REMEDIES—PRACTICE.—Under our system of jurisdiction all the common-law remedies are preserved in some form, and when a course of proceeding is not specifically pointed out, any suitable process may be adopted conformable to the spirit of the Code.

CIRCUIT COURTS—JURISDICTION OF.—Where the jurisdiction is not vested exclusively in some other court, all remedies for the enforcement of legal rights belong to the Circuit Court, which, when no mode of proceeding is pointed out, may adopt any most conformable to the spirit of the Code.

MARION COUNTY. Defendants appeal. Reversed.

The facts sufficiently appear in the opinion.

Opinion of the Court—Thayer, J.

Bonham & Ramsey, for Appellants.

The provisions of sections 1094, 1095, 1096, and 1098 of the Civil Code, adopted in 1862, are inconsistent with and repugnant to section 23, ch. 17, Misc. Laws, and by implication repeal the latter. (*Leonard v. Grant*, 8 Oreg. 276.) This complaint expressly alleges ownership of the land, and the answer denies the allegation. This raises an issue of title and ousts the jurisdiction of the court. (Misc. Laws, § 16, p. 615; *Sweek v. Galbreath*, 11 Oreg. 516.)

N. B. Knight, and *W. G. Piper*, for Respondent.

Section 23, ch. 17, Misc. Laws, is not inconsistent with the Act of 1862, regulating matters of probate. For construction of similar provisions, see Ala. Code, § 1630; *Oakley v. Oakley*, 30 Ala. 131. Any person entitled to the possession of premises may maintain forcible entry. (Misc. Laws, ch. 23, §§ 2, 16, pp. 613, 614.)

THAYER, J.—This is an appeal from a judgment of the Circuit Court for the county of Marion. The respondent, on the 10th day of July, 1884, commenced an action in the Justice's Court for Salem Precinct, Marion County, against the appellants, for forcible entry and detainer. She alleged in her complaint that George E. Aiken, her husband, died in said county on the 23d day of November, 1883, leaving her his widow, surviving him; that her husband at the time of his death was the owner of and seized in his own right of certain premises described therein as lots 7 and 8, block No. 17, University addition to the city of Salem, county and State aforesaid, together with the dwelling-house and all the buildings and appurtenances situated thereon, the same being the dwelling-house of the said George E. Aiken; that by reason of his death she became, and still was, entitled to the possession and occupancy of said dwelling-house and premises from and ever since that time; that notice to quit and deliver up said premises to her was duly served upon said appellants on the 23d day of June, 1884, more than ten days

before the commencement of said action; that they refused to quit the possession thereof, or of any part of the same, and unlawfully held the premises with force.

The appellants filed answer to the said complaint, in which they denied that the said George E. Aiken, at the time of his death, was the owner of, or was seized in his own right of, the said premises, or of the dwelling-house, buildings, or appurtenances; denied that the respondent became or was entitled to the possession or occupancy thereof; denied that they, or either of them, unlawfully held possession of the premises with force or otherwise. The issues so formed were tried in the said Justice's Court, and the respondent recovered a judgment therein for the possession of the premises. The appellants appealed therefrom to the said Circuit Court, and, after obtaining leave therefor, filed an amended answer, in which they denied all the allegations of the complaint except the alleged notice to quit, and of the death of the said George E. Aiken, and the widowhood of the respondent. The case was tried by jury, and resulted in a verdict of guilty against the appellants, upon which the judgment appealed from was entered.

Several questions were raised upon the trial as to the respondent's right to maintain the action, which have been presented to this court for review. The respondent claimed her right to recover the possession of the premises under and by virtue of section 23, ch. 17, Misc. Laws Oreg., which provides that "a widow may remain in the dwelling-house of her husband one year after his death without being chargeable with rent therefor, and shall have her reasonable sustenance out of the estate for one year." The appellants claim that said provision has been superseded by section 1094 of the Civil Code; the former provision having been adopted in 1854, and the latter in 1862, and that the two are inconsistent. They also claim that title to real property was drawn in question by the pleadings and evidence, and that the judgment is therefore erroneous. The provision included in said section 23, ch. 17, Misc. Laws, is a statutory enlargement of what was known at common law as the widow's quarantine, which is defined as a privilege the law allowed to women to

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continue in the capital, messuage, or mansion-house, or some other house whereof they were dowable forty days after their husband's death, whereof the day of his death was counted one. And during that time they were to be provided with all necessaries at the expense of the heir, and before the end thereof were to have their dower assigned to them. (Bacon Abr. n. b, tit. "Dower.")

We are of the opinion that said section of the statute has not been superseded by any of the other provisions of statute referred to in the appellant's brief, but are convinced that the respondent has mistaken her remedy in her attempt to enforce her alleged rights under it. At common law a widow entitled to such rights or benefit could, in case the heir or other persons ejected her, sue out a writ known as the writ *de quarantina habenda*. (Jac. Law Dict. tit. "Quarantine"; § 19, ch. 3, Scrib. Dower.) This seems to have been a summary process, and required the sheriff, if no just cause were shown against it, speedily to put her into possession. In some of the States a remedy is given by statute to enforce the right by writ, or in some form of action. (§ 20, ch. 3, Scrib. Dower.) But we have no specified course of proceeding in this State affording any such remedy. It is not included in the action to recover the possession of real property, as the plaintiff in that action must have a legal estate in the property as well as a right to the possession. (§ 313, Civ. Code.) This is not an estate; it is but a privilege or benefit. Executors and administrators are entitled to the possession of the estate for the purpose of administration; but they cannot recover the possession of it in such action (*Humphreys v. Taylor*, 5 Oreg. 260), and I think it doubtful that a purchaser of real property upon execution could, although entitled to the possession from the day of sale until a resale. (§ 304, Civ. Code.) Nor could such a privilege be enforced by an action of forcible entry and detainer. The merits of the title cannot be inquired into in such action. (§ 16, ch. 23, Misc. Laws.) The widow in the outset is required to prove that her husband was seized of the dwelling-house at the time of his death. The right only applies to lands of which he was owner, and not to a leasehold estate. (*Voelckner v. Hudson*, 1 Sand. 215.)

In the present case, it is alleged, as we have seen, that the respondent's husband, at the time of his death, was the owner, and seized in his own right, of said premises. This allegation was flatly denied in the answer. That issue was squarely presented to the Justice's Court for trial. Upon the trial in the Circuit Court, and probably before the justice, also, a deed was introduced in evidence upon the part of the respondent, apparently made and executed by the appellant John Aiken and his wife to the said George E. Aiken, in 1880, which purported to convey from the former to the latter the said premises. This proof was in direct support of the allegation of the complaint, and was entirely pertinent. A question of title to real property was as effectually tried as though the proceeding had been an action to recover the possession of real property. There might be cases of intrusion, in which a party could resort to the remedy of forcible entry and detainer without any greater right in the premises than the one under consideration, with no right, in fact, beyond that of prior occupancy. But this case, as made by the pleadings and the evidence shown in the bill of exceptions, is in the nature of an ouster by forcement. The respondent sought to recover possession by reason of her husband having been the owner of the premises, and of her relation to him as his widow. The title was necessarily litigated. Consequently, the justice before whom the action was tried had no jurisdiction, and the appeal to the Circuit Court did not give that tribunal jurisdiction. I do not think in such a case that a party is destitute of a remedy. All the common-law remedies are preserved under our system of jurisprudence in some form or other. They are not in all cases specifically pointed out, nor do we have any mode for devising or framing writs, but we have a general provision in our law preserving a remedy for every wrong a court of justice has power to redress.

Section 911 of the Civil Code enacts that "when jurisdiction is by the organic law of this State, or by this Code or any other statute, conferred on a court or judicial officer, all the means to carry it into effect are also given; and in the exercise of the jurisdiction, if the course of proceeding be not specifically

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pointed out by this Code, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this Code. Section 9 of article vii. of the Constitution of the State declares that all judicial power, authority, and jurisdiction not vested by the Constitution, or by laws consistent therewith exclusively in some other court, shall belong to the Circuit Courts. The result follows that all the enumerated remedies for the enforcement of legal rights, where the jurisdiction is not vested exclusively in some other court, belong to the Circuit Court, and any suitable process or mode of proceeding may be adopted for their enforcement which may appear most conformable to the spirit of the Code. There need, therefore, be no failure of justice, under the jurisprudence of this State, in consequence of the mode of proceeding pointed out being inadequate to afford a remedy in a particular case, as any remedy in such case may be adopted, subject to the qualification mentioned. It is beyond the scope of legislative wisdom to prescribe a specific remedy for every class of cases that may arise in the complication of human affairs, and it was not attempted; but ample provision was made to prevent a party from being left remediless in case of an infringement upon his legal rights, and the courts must of necessity recognize the provision and carry it out when a proper case is presented.

For the reasons before expressed the judgment must be reversed, and the case remanded to the Circuit Court, with directions to dismiss it for the want of jurisdiction of the Justice's Court, and of that court, upon appeal, to determine it.

[Filed April 17, 1885.]

MARY C. WELLS v. JOHN APPELEGATE, ADM'R.

PRACTICE—DEMURRER—RECORD OF A CAUSE.—When a demurrer is overruled, and the party pleads over, the demurrer is abandoned, and ceases to be a part of the record.

ID.—AMENDMENT.—When a new answer is filed the former answer is in effect withdrawn, and ceases to be a part of the record, and all motions and demurrers relating thereto accompany it.

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DOUGLAS COUNTY. Defendant appeals. Affirmed

This cause was before this court at the March term, 1883, when it was reversed and remanded for further proceedings. At the next ensuing term of the Circuit Court, the plaintiff filed an amended complaint. Defendant filed a second amended answer, denying the material allegations of the complaint, and setting up as new matter several counter-claims. Part of such new matter was stricken out on motion and a demurrer to the remainder was sustained, whereupon defendant filed a third amended answer, containing only denials of the allegations of the complaint. Upon the trial, judgment went for the plaintiff.

C. Ball, and Wm. M. Ramsey for Appellant.

Wm. R. Willis, for Respondent.

WALDO, C. J.—A part of the second amended answer was struck out on motion, and a demurrer was sustained to another part setting up a counter-claim. Defendant thereupon filed another answer purporting to be a new answer, but which it is now argued is not such, because it was but a copy of the former answer with the parts objected to left out; and even if it were a new answer, it is argued that exceptions to the order striking out and in sustaining the demurrer were not waived. Suppose the answer to be what it purports to be—a new answer. Then the rule is, when a demurrer is overruled and the party pleads over, the demurrer is abandoned, and it ceases to be a part of the record. (*Young v. Martin*, 8 Wall. 357.) So, “when a pleading is amended, the original pleading ceases to be a part of the record, because the party pleading having the power, has elected to make the change.” (*Brown v. Saratoga R. Co.* 18 N. Y. 495; *Tennant v. Pfister*, 45 Cal. 270; *Barada v. Carondelet*, 8 Mo. 649; *Bowles v. Doble*, 11 Oreg. 474.) The correct practice seems to be to ask leave to withdraw the abandoned pleading from the files and to plead over. (*Caldwell v. May*, 1 Stewt. 427; *Ford v. Jefferson Co.* 4 Greene, 274; *Earp v. Commissioners*, 36 Ind. 470.) Taking a bill of exceptions will

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not aid a party if he pleads over. (*Plummer v. Roads*, 4 Iowa, 589.) Then is the answer a new answer? The act of pleading over is conclusive of an intention to abandon the former answer. ((And see *Laws Oreg.* p. 126, § 102.)

The pleadings on which the parties went to trial became the sole pleadings in the case, as if no others ever existed. By filing the new answer the former answer was in effect withdrawn, and all motions and demurrers relating to it accompanied it. This must be so unless it be said that a new answer was not filed; but this contradicts the record. The errors thus waived by pleading over were the errors chiefly relied on to reverse the judgment. The third amended answer simply denied the complaint, and the defendant could not offer evidence of a failure of consideration under an answer containing simply a denial of the allegations of the complaint. (*McKyring v. Bull*, 16 N. Y. 304.)

The order must be that the judgment be affirmed.

[Filed April 17, 1885.]

RACHEL HAWTHORNE ET AL. v. CITY OF EAST
PORTLAND.

APPEAL—PRACTICE—UNDERTAKING.—Where an undertaking on appeal is filed before the notice of appeal is served, the appeal may be dismissed on motion. But when it appears that such undertaking was so filed in consequence of an excusable mistake, a cross-motion for leave to file an amended undertaking may be allowed upon proper terms.

APPEAL from Multnomah County. Motion to dismiss appeal.

Julius C. Moreland, for the Motion.

S. R. Harrington, contra.

THAYER, J.—This motion was filed on the part of the respondent herein to dismiss the appeal taken from the Circuit Court for the county of Multnomah by the appellants. The grounds of the motion were that no undertaking on appeal had been filed as required by law. Upon the filing of said motion

the appellant filed what is termed a cross-motion, for leave to perfect the said appeal by filing a new undertaking in this court. The filing of the latter motion is, in effect, a confession of the fact that no sufficient undertaking has been filed; and hence the only question for our determination is, whether the appellant has shown such a mistake in omitting to perfect its appeal in the manner mentioned as will authorize this court to permit it now to correct the omission.

It appears that Mr. Harrington, the city attorney of the city of East Portland, was directed by the common council of that city to take an appeal in the case, and that he has been making efforts for some time in that direction; that some time in December last a notice of appeal was served upon the respondent, but was not perfected, and that on the 16th day of January, 1885, said city attorney prepared a notice of appeal in the case, and an undertaking, and that he delivered the undertaking to Mr. I. N. Saunders, the mayor of said city, with directions to have it executed, and that subsequently, and on the 22d day of January, 1885, he served the said notice on the respondent, and filed the same, with proof of service, in the office of the clerk of said Circuit Court.

It also appears that Mr. Saunders, who is the county clerk of said county of Multnomah, as well as mayor of said city, after receiving said undertaking procured it to be duly executed, and thereupon, and on the 17th day of January, 1885, marked it filed as of that day, without having called Mr. Harrington's attention to the fact; that the latter, upon filing such notice of appeal, ascertained from the clerk said fact, and thereupon informed Mr. Saunders that he did not intend to have him file said undertaking until the service of the notice of appeal, and that he only delivered it to him to have it executed. The said undertaking was then among the archives of the court. But Mr. Saunders, discovering that he had prematurely marked it filed, and thinking that it would not be improper to correct the error, changed the date of the filing to the 27th day of January, 1885, though in his certificate to the transcript forwarded to this court he certified that the undertaking was filed on the 17th day of

January, as originally marked filed. The said city attorney, however, supposing that the clerk, under the dual position he occupied, could change the said file-mark as mentioned, paid no further attention to the matter until he ascertained that said motion to dismiss his appeal had been filed, and that the certificate to the transcript indicated the date of filing as of said 17th day of January. I think we may reasonably conclude that the affair was a mistake within the meaning of subdivision 4 of section 527 of the Civil Code.

In the hurry and bustle of a large law practice, an attorney cannot be expected to personally attend to every act in the course of his duty. He must necessarily rely upon others to assist in the details of his business. The attorney in this case had prepared the undertaking and relied upon Mr. Saunders having it executed, and the latter supposed that it would be proper to mark it filed when executed; and when he ascertained that he had made a mistake in doing so, supposed he had a right to correct it. He could very properly have done so if he had not deposited it with the files of the court; after he did that he lost control over the matter, and should not have attempted it, though I think the clerk was acting in good faith at the time. Mr. Harrington, however, may not have known but that the former was at this time retaining the paper in his character as mayor, in which case he could properly have changed the date of filing. The appeal was evidently taken in good faith, and the court should hesitate to dismiss it when there is an apparent mistake. The attorney for the appellant may not have given the matter that particular attention that he should; he brought the transcript here in the faulty condition shown, and the respondent was fully justified in filing the motion to dismiss. I believe, therefore, that the cross-motion should not be allowed except upon terms. An order will therefore be entered permitting the appellant to file such undertaking upon payment to the respondent's attorney of the sum of ten dollars.

[Filed April 20, 1885.]

ROBERT PHIPPS v. SARAH J. KELLY.

MARRIED WOMEN—POWER TO CONTRACT—FAMILY EXPENSE.—The effect of the act regulating the rights and liabilities of married women (approved October 21, 1878) was to enable her to contract and incur liabilities, and such contracts and liabilities may be enforced the same as if she were unmarried. For family expenses she may be sued jointly with her husband, or separately, and a personal judgment rendered against her.

REMEDIES—LEGAL RIGHTS—JURISDICTION AT LAW.—When a right is of such a character that a court of law is authorized to take cognizance of it, and to afford a plain, adequate, and complete remedy, the general principle is that the plaintiff must enforce his right at law.

Id.—EQUITABLE JURISDICTION.—But when a court of equity originally had jurisdiction in any class of cases for which the proceeding at common law did not then afford an adequate remedy, such jurisdiction will not be lost by reason of subsequent legislation conferring on courts of law authority to decide such cases, unless there are negative words excluding the jurisdiction of equity.

Id.—When a court of equity has taken jurisdiction for one purpose, it will generally retain the case until the whole subject is disposed of; but the primary and original object of the suit must in such case be clearly within its jurisdiction

DOUGLAS COUNTY. Defendant appeals. Affirmed.

The facts sufficiently appear in the opinion.

William R. Willis, for Respondent.

When a court of equity has jurisdiction over a cause for any purpose, it may retain the cause for all purposes, and proceed to a final determination of all the matters at issue. (See 1 Pom. Eq. Juris. §§ 181, 231; *Oelrichs v. Spain*, 15 Wall. 211; *Bradley v. Bosley*, 1 Barb. Ch. 125.) It is too late, after a defendant has put in an answer submitting himself to the jurisdiction of the court, without objection, to insist that the complainant has a perfect remedy at law. (*Wiswall v. Hall*, 3 Paige Ch. 313; *Underhill v. Van Cortlandt*, 2 Johns. Ch. 339.) That the expenses of the family are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately. (Sess. Laws 1878, p. 94, § 10; *Watkins v. Mason*, 11 Oreg. 72; S. C. 4 Pac. Rep. 524, and cases cited.)

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37 423
38 530

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C. Ball, for Appellant.

The complaint is for a single cause of action, only, on special contract. (Civ. Code, p. 191, § 390.) If not for a single cause of suit then there is a misjoinder. (*Nichols v. Drew*, 94 N. Y. 22.) The testimony contradicts and makes out a different case from "the future advances alleged in the bill of complaint," and should be dismissed. (*Elliott v. Amazon Ins. Co.* 49 Mich. 579; *Booth v. Thompson*, 49 Mich. 73.) Where the equities are disproved the court will not retain the bill. (*Graves v. Boston Marine Ins. Co.* 2 Cranch, 419; *Dugan v. Cureton*, 1 Ark. 31; S. C. 31 Am. Dec. 727.)

LORD, J.—The defendants were husband and wife. The plaintiff, who is the assignee of Marks & Co., bases his right to relief upon the grounds, (1) that the indebtedness, consisting of a promissory note, book-account, and goods, wares, and merchandise, which were sold and delivered as future advances, was by agreement of the parties secured by a deed intended to operate as a mortgage, and executed by the defendants upon the separate property of the wife; (2) that the whole amount of such indebtedness was made and incurred for expenses of the family in the purchase of goods, wares, and merchandise by the defendants as husband and wife, and that the same were received and used in their family, consisting of the defendants and their children. The wife denied that the deed was executed as a payment of the whole of such indebtedness, but alleged that it was executed and given only as a security for the payment of the note, and no more; but she did not deny the correctness of the claims or amounts, nor that the goods, wares, and merchandise were purchased for and used by the family, or that they were the expenses of the family. After a trial upon the merits, the court found that the deed was executed and intended to operate only as a security for the payment of the note, but that the balance of the indebtedness was contracted for family expenses, in the purchase of goods and merchandise, which were received and used in the family of the defendants, and was properly chargeable upon the property of the wife, and

made a decree accordingly. It is to test the correctness of the decree in this regard that the wife has brought this appeal.

Section 10 of the Act of 1878 provides "that the expenses of the family and the education of the children are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately." (Sess. Laws 1878, p. 94.) The general effect of this act was, undoubtedly, to extend and enlarge the rights and liabilities of married women much beyond previous limitations. The disability to make contracts and incur liabilities, which formerly existed at law, it removed, and now a married woman may do either, and her contracts and liabilities may be enforced by or against her to the same extent and in the same manner as if she were unmarried. For liabilities incurred as a family expense she may be sued at law jointly with her husband, or separately, and a personal judgment may be rendered against her. This was expressly recognized by this court in *Watkins v. Mason*, 11 Oreg. 72. And see also *Polly v. Walker*, 60 Iowa, 88; *Jones v. Glass*, 48 Iowa, 345. There is, then, under the statute, a remedy at law which may be enforced against her for an indebtedness incurred as a family expense, for which her property may become liable.

It is insisted by counsel for the appellant that there is a complete remedy at law for the matter upon which that portion of the decree appealed from is based, and that as to it the decree ought to be reversed, and the complaint dismissed. His contention is to the effect that this objection is jurisdictional, and ought to be enforced by the court *sua sponte*. This is the rule in the United States courts when the objection is well taken, though it is not raised by the pleadings, nor suggested by counsel. (*Oelrichs v. Spain*, 15 Wall. 228.) Our Code provides that "the enforcement or protection of a private right, or the prevention of or redress for an injury thereto, shall be obtained by a suit in equity, in all cases where there is not a plain, adequate, and complete remedy at law"; but this, probably, is merely declaratory of the pre-existing rule. (*Oelrichs v. Spain*, *supra*.) When the right is of such a character that a court of law is

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authorized to take cognizance, and is competent to render a judgment which affords a plain, adequate, and complete remedy, the general principle undoubtedly is that the plaintiff must enforce his right at law. In such case, the right being purely legal, and disentangled of any equitable feature, and the remedy at law being adequate and efficient to secure the ends of justice, and its prompt administration, there is no ground for equitable interference, and its jurisdiction should be rejected. A strictly legal right, unaffected by any equitable incident, for which there is a legal remedy adequate and speedy for its enforcement or protection, is a not properly a subject-matter within the legitimate province of equity, and of which equity could take cognizance without depriving the defendant of his constitutional rights to a trial by jury. This is a highly valued right, to which the people are attached, for the legal settlement of disputed questions of fact, and which they have secured by constitutional guaranty, to the end that no one should be deprived of it except for some proper or specified cause. As relevant to the particular subject, Hunt, J., said:—

“The right to a trial by a jury is a great constitutional right, and it is only in exceptional cases, and for specified causes, that a party may be deprived of it. It is in vindication of this great principle, and as declaratory of the common law, that the Judiciary Act of 1789, in its sixteenth section, declares ‘that suits in equity shall not be sustained in either of the courts of the United States in any case where adequate and complete remedy may be had at law.’” (*Grand Chute v. Winegar*, 15 Wall. 375; *Insurance Co. v. Bailey*, 13 Wall. 616; *Hipp v. Babin*, 19 How. 271–278; *Parker v. Winnipiseogee Lake etc. Co.* 2 Black, 550, 551.)

As a result of this doctrine, stated in its broadest terms, the general principle deducible from the authorities and text-writers, with perhaps some qualification or limitation, is that where the right or interest to be protected is of a purely legal character, and a court of law can, by its mode of procedure and judgment, do complete justice to the matter in controversy as a court of equity, the remedy is at law, and the jurisdiction of equity will

be rejected. "When," says Mr. Pomeroy, "the primary right of the plaintiff is purely legal, arising either from the non-performance of a contract or from a tort, and the money is sought to be recovered as a debt or damages, and the right of action is not dependent upon or connected with any equitable feature or incident, such as from mistake, accident, trust, accounting, contribution, and the like, full and certain remedies are afforded by action at law, and equity has no jurisdiction. These are cases especially within the sole cognizance of law. (Pom. Eq. Juris. § 178, and n.) The relief sought in such cases is in no sense equitable, and the jurisdiction in equity should be rejected by the court itself as without its domain. (*Howard v. Jones*, 5 Ired. Eq. 75; *Echols v. Hammond*, 30 Miss. 177; *Stewart v. Mumford*, 80 Ill. 192; *Bennett v. Nichols*, 12 Mich. 22; *Coquillard v. Suydam*, 8 Blackf. 25.) A court of equity cannot create a lien on real estate to secure a personal debt not contracted on its credit, and not charged upon it by agreement (*Bennett v. Nichols*, *supra*); nor is the remedy in equity, but at law, for a debt for goods sold and delivered. (*Coquillard v. Suydam*, *supra*.)

Under section 10 the property of the husband, like the wife, is chargeable for family expenses; but it is apprehended that on liabilities incurred by him for family expenses, in the purchase of goods and wardrobe used in the family, the remedy is exclusively at law, unless the transaction is in some way equitably connected. But now he, or she, or both of them, may be sued at law, and the judgment obtained enforced against the property for a debt incurred for family expenses (*Watkins v. Mason*, *supra*); but there is this difference, that the husband was liable originally to an action at law for such debts, but the wife has only become so by virtue of the statute. With him the right to contract, and the capacity to sue or be sued at law, existed originally; and the remedy at law being adequate and complete to attain the ends of justice without the aid of equity, there could be no pretense for the exercise of chancery jurisdiction. With her the case was wholly different. The law recognized in her no separate existence or identity. It was merged in her hus-

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band. She never had the capacity to contract, nor to sue or be sued. Originally, at law, for her or against her, there could be no remedy. All her rights and liabilities, prior to the statute, lay within the domain of equity. It was only in equity that her rights, interests, and estate could be maintained, protected, or redressed; and it was only there that she was treated as a *femme sole*, and her contracts recognized and enforced against her separate property. All her rights and liabilities hitherto being available only in equity for the want of any remedy at law, the doctrine of the cases cited, and the principle deducible from them, can have no application here, unless the statute has superseded or ousted the equitable jurisdiction.

The general rule established by the authorities is that when a court of equity originally had jurisdiction in any class of cases, for which the ordinary proceeding at common law did not then afford an adequate remedy, that jurisdiction will not be lost by reason of subsequent legislative enactments which confer on courts of law authority to decide in such cases, unless there are negative words excluding the jurisdiction of courts of equity. This principle is thus stated by Judge Story:—

“In modern times courts of law frequently interfere, and grant remedies under circumstances in which it would have certainly been denied in earlier times, and sometimes the legislature, by express enactments, have conferred on courts of law the same remedial faculty that belongs to courts of equity; now in neither case, if courts of equity obtained and exercised jurisdiction, is that jurisdiction overturned or impaired by this change of authority at law in regard to legislative enactments? For, unless there are prohibitory or restrictive words, the uniform interpretation is that they confer concurrent and not exclusive remedial authority.” (Story Eq. Juris. § 80.)

The same principle is thus stated by Mr. Pomeroy:—

“Whenever the statutes conferring the new jurisdiction upon the law courts are permissive only, or whenever they not only contain no express prohibitive language, but also do not indicate from all these provisions, taken together, any clear intent to restrict the equitable jurisdiction, that jurisdiction remains

unaffected, and may be still exercised, even though the rights protected and the remedies enforced have, by the statutes, been made legal, and a relief ordinarily sufficient, even amply sufficient and complete, may be obtained through the actions at law. If the statute is expressly prohibitory upon the equity courts, or if it shows a clear and certain intent that the equitable jurisdiction is no longer to be exercised over the matters within the scope of the enactments, then such jurisdiction of equity in the particular class of cases must be considered as virtually abrogated." (Pom. Eq. Juris. 182, and authorities cited in the note.)

As a result of this doctrine a creditor may resort to either forum to enforce his claim against the separate property of a married woman, unless the intent to exclude the equitable jurisdiction is clearly manifested by the statute. This has been expressly decided. In *Mitchell v. Otey*, 23 Miss. 236, it was held that the provisions of the "Married Woman's Law" of 1846 do not oust the original jurisdiction of courts of equity in cases affecting the estates of married women, and that a creditor may assert his demands against the husband and wife at law at his election, the two jurisdictions being concurrent in such cases. Now, it must be conceded there are no negative words in the section nor the statute, excluding the equitable jurisdiction, nor do we discover any intent, expressly or by implication, to make the remedy at law exclusive in cases where the right or estate to be protected, enforced, or redressed was originally available only in equity. All that can be said is that the liability of the property of the wife for family expenses, under the section, has been extended or enlarged beyond what it formerly was. Although primarily the husband is the head of the household, and as such bound to provide for his family, yet the wife's separate estate was chargeable in equity for necessities furnished on her credit and intended to be a charge against her estate. "Family expenses" may include necessities, and more. In *Smedley v. Felt*, 41 Iowa, 590, the court, in commenting upon a section of the statute identical with this, said:—

"The language of the statute is general. It applies to the expenses of the family without limitation or qualification as to

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the kind or amount. . . . What is necessary depends very much upon the wealth, habits, and social position of a party; what is a family expense depends upon none of these considerations. . . . The only criterion which the statute furnishes is, was the expenditure a family expense, was it incurred for, on account of, and to be used in the family?"

But this, in fact, is only an enlargement of the subject-matter upon which equity acted; it does not touch or impair the power or jurisdiction of equity. The object of these enabling statutes generally is, unless the intent is clearly otherwise expressed, to bring and regulate the legal rights and liabilities in harmony with equitable principles. The jurisdictions are concurrent, and the fact of a remedy at law does not, in such case, oust the equitable jurisdiction, and the objection, therefore, is unavailing. It was also objected that, although the facts stated might authorize the interposition of equity to charge liabilities incurred for family expenses against the property of a married woman, the subject of this suit was based more properly upon the agreement under which the deed was given as a security and to operate as a mortgage. But this is not the case. The facts set up two grounds upon which relief is based. It is true that they might have been better stated, but there is not a defect of substance, and this is admitted.

The facts stated give full notice of the grounds upon which it is sought to charge the property of the defendant, and a trial upon the merits has established the liability and the right to the relief. It is upon the facts that the courts grant relief, although informally stated, where not inconsistent with the purposes of the suit. Informality of statement, which involves no defects of substance, cannot be taken advantage of after trial and judgment. It is, no doubt, true that where the suit is simply for foreclosure, based upon the terms of the contract and mortgage, no debt, except such as is authorized by it, can be decreed to be paid under it. In such case the mortgage cannot be extended to a debt not embraced in its provisions. (*Tunno v. Robert*, 16 Fla. 738.) But that is not this case. Here, the facts constituting the grounds for the relief sought to

Argument for Appellants.

be established are distinctly stated and met, and the court is competent to grant relief not inconsistent with them. In the course of the argument it was said that a court of equity, having taken cognizance of a case, will retain it until all matters connected with it are settled. This is not strictly correct. "When a court of equity has taken jurisdiction of a case for one purpose, it will generally retain the case until the whole subject is disposed of; but the primary and original object of the suit must be one clearly within its jurisdiction, and even then the court will not always retain the bill." (*Dugan v. Oureton*, 1 Ark. 31.) Here the primary and original object of the suit, based upon the facts alleged, is to charge the property described in the complaint; and an examination of the record satisfies us there was no error.

[Filed April 27, 1885.]

WALTER V. SMITH v. CHARLES GARDNER ET AL.

INJUNCTION—TRESPASS—REMEDY AT LAW.—An injunction will be granted to restrain a trespass only when the facts show that the injury would be irreparable, and the remedy at law inadequate to redress the wrong or injury complained of. In all ordinary cases the party must resort to a court of law.

HIGHWAY—DEDICATION—USER.—The owner of the soil may make a qualified dedication of a road or way across it; he may reserve the right to keep a gate across it, or to subject it to any use not inconsistent with the public use. *Semble*, mere user, however long continued, is not sufficient to give a right to the public.

ID.—PERMISSIVE USER.—Permissive use of a way by certain portions of the community constitutes a license and not a dedication.

MULTNOMAH COUNTY. Defendants appeal. Reversed and bill dismissed.

Charles Gardner, and P. L. Willis, for Appellants.

To effect a dedication of a highway the intention of the owner to dedicate is not always necessary. (*Angell Highways*, § 145.) A dedication will be presumed against the owner of land when he has permitted the public to use it for such a length of time that the public accommodation and private rights might be

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materially affected by an interruption of the enjoyment. (*Cincinnati v. White's Lessee*, 6 Peters, 439.) "Such time only is requisite as suffices to acquire that interest, with the assent and concurrence of the owner, which would render it fraudulent in him to resume his rights." (*State v. Trask*, 6 Vt. 355; S. C. 27 Am. Dec. 559; *Abbott v. Mills*, 3 Vt. 521; *Parrish v. Stephens*, 1 Oreg. 69.) A limited dedication of a highway may be made. (*Niagara Falls etc. Co. v. Bachman*, 66 N. Y. 261; *State v. Trask*, *supra*.) A highway may be dedicated with gates thereon. (*Davies v. Stephens*, 7 Car. & P. 570; *Bolger v. Foss*, 3 Pacif. L. Rep. 871; S. C. 2 West C. Rep. 897.) The action of an owner of land inclosing a traveled way, and at the same time opening another way by which the travel could reach the same destination as by the former, would operate as an immediate dedication by such owner of the way so opened. (*Hobbs v. Lowell*, 19 Pick. 407.) Where a slight change does not operate as an immediate dedication of the line to which the change is made, it does not vary the effect of the use of the same general line of travel. (*Douglas Co. Rd. Co. v. Abraham*, 5 Oreg. 321.)

H. Y. Thompson, for Respondent.

If a person uses a space upon his own land for a road, for his own convenience, the mere fact that the community are allowed to use it in common with him for twenty or thirty years will not constitute a dedication. (*Dovaston v. Payne*, 2 Smith Lead. Cas. 200.) There must be some act of the owner clearly evincing an intention to dedicate. (*Carter v. City of Portland*, 4 Oreg. 343.) Proof that a way has been used as a road for more than thirty years, encumbered all the time with gates and bars in the summer seasons, without its ever having been fenced on its sides, is not sufficient to show that it is a public highway. (*Stacey v. Miller*, 14 Mo. 478; *State v. Strong*, 25 Me. 297; *Irwin v. Dixon*, 9 How. 10; *Carpenter v. Gwynn*, 35 Barb. 395; *Angell Highways*, p. 165.)

LORD, J.—This is a suit in equity for an injunction to restrain

the defendants from trespassing upon the lands of the plaintiff. In substance it is alleged that the plaintiff is the owner of the lands described in the complaint, and that the defendants are the owners of a tract of land lying north of, and adjacent to, said lands; that the plaintiff's lands are meadow lands; and that the defendants have been guilty of a series of trespasses upon plaintiff's said lands, such as driving over his meadows, destroying his grass, cutting up his soil with wagons, and breaking and destroying his fences; and that the defendants threaten to continue the trespasses complained of, to the irreparable damage of the plaintiff. The answer denies nearly all the allegations of the complaint, and then, in a further answer, justifies the acts complained of, on the ground that there is a public highway across the plaintiff's lands at the place where said acts were committed; and that the defendants have done nothing more than travel said highway, and remove obstructions therefrom; and that such public highway was established by use for a period long enough to create such an easement. The reply puts in issue the uses and existence of the highway.

The manifest object of this suit is to determine whether a highway exists across the lands of the plaintiff. Analyzed, the complaint is nothing more nor less than an action of trespass *quare clausum fregit*, to which the defendants plead in effect, (1) not guilty; (2) justification, that the fence or gates which they removed were obstructions to a public highway, which they had a right to remove. The replication denied that it was a public highway, and that was the issue to be tried. Indeed, it was said at the argument and in the briefs that the only question in the case was whether or not there is a highway across the plaintiff's land. The mode by which it is sought to determine this question is not in the ordinary course of law, and ought not to be tolerated unless justified by particular facts which authorize the jurisdiction of equity. The practice of granting injunctions in cases of trespass is of comparatively modern origin, and is a jurisdiction sparingly indulged; and only upon a state of facts which show that the injury would be irreparable, and the remedy at law inadequate to redress the wrong or injury complained of.

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When the nature of the trespass is such as must necessarily lead to oppressive litigation or a multiplicity of suits, or the injury goes to the destruction of the estate in the character in which it is enjoyed, or the trespass cannot be adequately compensated in damages, and the remedy at law is plainly inadequate, a court of equity, in such or like cases, is authorized to interfere and grant relief by injunction. But the general doctrine, well established by the authorities, is that a court of equity will not grant an injunction to restrain a mere trespass where the injury complained of is not irreparable, and destructive of the plaintiff's estate, but is susceptible of pecuniary compensation, and for which he may obtain adequate satisfaction in the ordinary course of law. (High Injunctions, §§ 697, 703; 3 Wait Act. and Def. tit. "Trespass," and authorities cited; Pom. Eq. Juris. § 1357, n.)

"Equity," said Pearson, J., "does not extend its jurisdiction either to offenses against the public or to civil trespasses. In reference to the former no exception has ever been made; but in reference to the latter an exception has been allowed, after much hesitation, and jurisdiction assumed for the prevention of torts or injuries to property by means of the writ of injunction under certain restrictions, namely: two conditions must concur in order to give jurisdiction, the plaintiff's title must be admitted, or be established by a legal adjudication, and the threatened injury must be of such a nature as will cause irreparable damage." (*Gause v. Perkins*, 3 Jones Eq. 178. See also *Bolster v. Catterlin*, 10 Ind. 118; *Jerome v. Ross*, 7 Johns. Ch. 334; *Cooper v. Hamilton*, 8 Blackf. 378; *McMillan v. Ferrell*, 7 W. Va. 229; *Smith v. Pettingill*, 15 Vt. 84.)

Now, what is the injury of which the plaintiff complains? Simply that the defendants have torn down his fence or gate and driven their team across his meadow, whereby the grass has been trampled down and destroyed. It will hardly be contended that the destruction of the fence or gate is not susceptible of pecuniary compensation, and for which the law does not afford a prompt, adequate, and complete remedy. It is true that grass trampled down and destroyed cannot be made to grow again, but the injury can be adequately atoned for in money.

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If, therefore, the plaintiff can recover for the trespass compensation equivalent or adequate to the injury which he has sustained, such injury, in no sense of the word, can be considered irreparable. All the cases fix the rule to be that the injury must be of that peculiar nature that it cannot be adequately compensated in damages or atoned for in money. There must be some equitable feature or incident to take it out of this rule, or equity will not interfere; as where the injury, although susceptible of pecuniary compensation, yet in the particular case, if the party is insolvent, and on that account unable to atone for it, it will be considered irreparable. But where the facts present no matter requiring equitable relief, and the remedy at law is adequate to do full and complete justice, the court itself should reject such jurisdiction as not within its legitimate province. To hold otherwise would confound all principles upon which the equitable jurisdiction stands. It will only be necessary to cite a few out of many cases to show that the remedy at law is not only adequate, but the one invariably pursued in cases of this character. (*Oyr v. Madore*, 73 Me. 53; *Wright v. Tukey*, 3 Cush. 290; *Burnham v. McQuesten*, 48 N. H. 446; *Marcy v. Taylor*, 19 Ill. 634; *Morse v. Ranno*, 32 Vt. 600; *Sharp v. Mynatt*, 1 Lea (Tenn.) 375; *Barracough v. Johnson*, 8 Ad. & E. 99; *Le Neve v. Mile End Old Town*, 8 El. & B. 1055.)

There is another consideration to which it may not be amiss to refer. Upon the admitted facts, the record discloses that the alleged road never was, in one sense, an open and unobstructed highway. It has always had gates or bars across it, through which those traveling over it had to pass. The claim that it is a public road is based upon user and dedication. It is admitted that it has never been worked, repaired, or accepted by the proper authorities of the county. That the owner of the soil may make a qualified dedication of a road or way is established by judicial authority. He may reserve the right to keep a gate across it, or to subject it to any uses by himself or others not inconsistent with the public use, and if the public accept it, it takes it subject to these uses. (*Wood Nuis.* §§ 242, 243, and note of authorities; *Davies v. Stephens*, 7 Car. & P. 571.) But

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the doctrine that a right of way or public road, with gates or bars across it, may be shown by dedication is cautiously admitted and applied. In the case of *Worth v. Dawson*, 1 Sneed, 62, where the road had been used by the neighbors as a church and mill road for nearly thirty years, the court say:—

“No use or acceptance of the way by the public is shown, nor any recognition of it by the proper authority, the county court. That a right of way may be claimed by dedication to the public use by the owner of the soil is not denied; but with us this doctrine must be cautiously admitted. Its too easy application would defeat the right of the owner of the soil to have compensation for damages sustained by laying out a road over his land, to which he is entitled when such road is laid out by the proper authority.”

In *Jackson v. State*, 6 Cold. 535, the principle is cited with approval from Angell on Highways that mere user, however, uninterrupted by the public, and long continued, is not sufficient to give the right in the public; but that such user must be accompanied by acts showing the user to have been under a claim of right, and not merely by permission of the land-owner; such as working the road, keeping it up by the public, repairing it, or removing obstructions, etc. “A permissive use of a way by certain portions of the community constitutes a license and not a dedication, and is ordinarily something that may be revoked.” “Everything, in such cases,” said Barrows, J., “depends upon the intention of the party whose dedication is claimed, and upon the character of the permission given and the use allowed.” (*White v. Bradley*, 66 Me. 259; citing *Stafford v. Coyney*, 7 Barn. & C. 257, and *Barraclough v. Johnson*, 8 Ad. & E. 99.) In *Hall v. McLeod*, 2 Met. (Ky.) 101, Simpson, C. J., said:—

“It cannot be admitted that where the proprietor of land has a pass-way through it for his own use, the mere permissive use of it by other persons for half a century would confer upon them any right to its enjoyment. So long as its use is merely permissive, it confers no right; but the proprietor can prohibit its use or discontinue it altogether at his pleasure. A different

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doctrine would have a tendency to destroy all neighborhood accommodation in the way of travel; for if it were once understood that a man, by allowing his neighbors to pass through his farm without objection over the pass-way, which he used himself, would thereby, after the lapse of twenty or thirty years, confer a right on him to require the pass-way to be kept open for his benefit and enjoyment, a prohibition against all such travel would immediately ensue."

See also *Kilburn v. Adams*, 7 Met. 33; *State v. Nudd*, 23 N. H. 335; *Morse v. Ranna*, 32 Vt. 600; *Jones v. Davis*, 35 Wis. 382; *State v. Harden*, 11 S. C. 366; *Burnham v. Mo-Questen*, 48 N. H. 451; *Sharp v. Mymatt*, 1 Lea, 376; *Wright v. Tukey*, 3 Cush. 290.

Without intending in the slightest degree to express any opinion upon the merits, the real controversy in this case turns upon the question whether or not there is a public road where the alleged acts of trespass were committed. Upon this point, although there is not much controversy about the facts in evidence, the inferences sought to be drawn from them by the parties are wholly irreconcilable and antagonistic. Upon the one hand, it is contended that the evidence establishes that the plaintiff intended to dedicate it to the public as a highway. On the other hand, it is contended that the plaintiff, and those who preceded him in the fee, did not intend it as a dedication to the public, but as a private way for his own convenience, and that the use of it by the public was only permissive, and constituted a license, which was revocable at his pleasure. Here, then, are questions of fact to be investigated, which a jury, under the guidance of a court of law, are peculiarly fitted to determine, and which the authorities cited show that the remedy at law is not only appropriate, but competent, to render a judgment which shall establish the right or estate, and do complete justice to the matter in controversy. In *Hacker v. Barton*, 84 Ill. 314, the court holds, following *Wing v. Sherrer*, 77 Ill. 200, that, "as a general rule, it is better in all cases of a doubtful character, presenting a conflict of evidence, that parties should be remitted to whatever remedy they may have at law,

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although equity might entertain jurisdiction"; and that this was especially so when there was a conflict of evidence in regard to the alleged fact of dedication of land to public uses. But here the case is without any equitable facts or circumstances upon which such jurisdiction can be based or assumed. The remedy is at law, and must be pursued there.

The decree is reversed, and the bill dismissed.

[Filed April 23, 1883.]

D. L. GEE v. M. L. CULVER.

MALICIOUS PROSECUTION — DEFENSE. — It is no defense to an action for malicious prosecution that the defendant laid the facts within his knowledge before a justice of the peace, and acted on his advice in making the arrests complained of.

ID. — MALICE TO BE PROVEN. — An instruction that "if the defendant acted rashly, wantonly, or wickedly, the presumption of malice is conclusive," is erroneous in making the question of malice an inference of law instead of a fact to be proved.

PROBABLE CAUSE — LAW AND FACT. — The question of probable cause is a mixed question of law and fact.

ID. — PLEADING — JUSTIFICATION. — (Per THAYER, J., concurring). — Under a simple denial, a defendant can only give in evidence matter which directly controverts the allegations of the complaint. He cannot justify without alleging in his answer the facts constituting such justification.

PLEADING — DENIAL — AFFIRMATIVE MATTER. — The denial of an allegation need not be absolute nor in any particular form. Affirmative matter qualifying a denial, when it does not amount to a justification, need not be separately stated, but may be joined to the denial as an *absque hoc*.

MULTNOMAH COUNTY. Defendant appeals. Reversed and new trial ordered.

The respondent alleged in his complaint in substance that the appellant, on the 29th day of December, 1883, wrongfully and maliciously went before a justice of the peace of said county, and without probable cause charged him with the crime of embezzlement, and of converting \$113, and procured a warrant for his arrest upon said charge, and wrongfully, unlawfully, and maliciously, and without any probable cause, went to the residence of the respondent and arrested him, and compelled him to go with him to East Portland, and there and then confined him

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in the city jail for four hours, when respondent was taken before the said justice of the peace for examination upon said charge, and was thereupon discharged, and the action was dismissed and ended. The appellant filed an answer to the complaint, in which he denied the alleged wrongful, unlawful, and malicious going before the said justice of the peace, and of so making the said charge, or that he otherwise charged respondent with said crime, except as thereafter alleged, or that he so procured a warrant for the arrest of the respondent upon such charge, or so arrested or imprisoned him, or otherwise arrested or imprisoned him for any time. And for a further and separate answer and defense alleged that he was a constable of said county of Multnomah, duly appointed and qualified to act as such; that on said 29th day of December, 1883, having information and being in possession of facts which he believed constituted the commission of a crime by the respondent, he made a true statement of all said facts, and all the facts in relation thereto within his knowledge and possession, to the said justice of the peace, and that said justice, being satisfied that a crime had been committed, and that there was probable cause to believe the respondent guilty thereof, caused an information to be made and subscribed by the appellant, charging the respondent with said crime; that thereupon said justice duly issued to appellant a warrant for the arrest of the respondent, and to bring him before said justice at his office; and that under and by virtue of said warrant, and in the discharge of his official duty as such constable, he arrested the respondent and took him before said justice in obedience to said writ, and not otherwise. The respondent filed a demurrer to that part of the appellant's answer which is termed a further and separate answer, upon the grounds that it did not constitute a defense or mitigation. The court sustained the demurrer, and the remaining issues were tried before a jury, who returned a verdict in favor of the respondent for the sum of \$100, upon which the judgment appealed from was entered. Evidence was given upon the trial, as appears from the bill of exceptions, that the appellant made the complaint before the justice of the peace charging the respondent with having

Statement of Facts.

embezzled \$113 of money belonging to J. M. Scott, and applied to the justice for a warrant for his arrest, which the justice issued to the appellant as such constable. At the time the warrant was issued, the appellant stated that he wanted an order indorsed on the warrant authorizing him to make the arrest on Sunday, stating that the respondent might escape. The respondent, against the objection of the appellant, also gave in evidence the part of the transcript of the proceedings had before the said justice of the peace, showing the amount of fees earned by appellant as constable in such case, which was \$3.30. The respondent gave evidence tending to show that he and two brothers of his resided on a farm owned by them in said county, worth \$5,000; that on Friday, the day before he was arrested by the appellant, he came to East Portland with some stock he had sold. After delivering the cattle he went around town for awhile and then went home. Upon the next day he came back to town, did some marketing, and went home again; that he received the money for the cattle (\$113) on the Friday he delivered them; that J. M. Scott had given him permission to sell the cattle; that Scott had a chattel mortgage on them; that he started home on Friday about 2 or 3 o'clock at night, got home about 4 o'clock in the morning, and Sunday morning, about 2 or 3 o'clock, the appellant and Mr. Linville, the marshal of East Portland, came and arrested him upon said charge and took him back to town. Upon cross-examination of the respondent, as a witness, he admitted that he had been convicted of larceny as bailee in a Justice's Court, which he attempted to explain as having been wrong. It also appeared that Mr. Scott had a mortgage upon the cattle sold by the respondent, but that he had given him permission to sell them, and either to pay him the money or replace other cattle, and that Scott did not direct the arrest, or know anything about it, until after the respondent was arrested. It appeared, also, that Mr. Scott and appellant resided in the same precinct in East Portland. Testimony was also given tending to show that the respondent's reputation for honesty and integrity was bad; that after he received said money for the cattle it was reported that

Argument for Appellant.

he had been robbed, also that he had gambled the money off, and there would seem to have been a general suspicion that he had made way with the money; that reports from several citizens were made to the appellant of the fact that the respondent had received the money; that it belonged to Mr. Scott, and that he had probably gambled it off. This, in connection with the bad reputation of the respondent, led to the prosecution. The court gave the following instructions, which are alleged as error:—

First—If the defendant acted rashly, wantonly, or wickedly, the presumption of malice is conclusive, and defendant is responsible. The facts ought to satisfy any reasonable mind that the accuser had no ground for the proceedings but his desire to injure the accused.

Second—If the defendant might, with reasonable diligence, have ascertained the facts before he began the action he should have done so. The defendant to rebut malice, when the plaintiff has made a *prima facie* case, must show that he did all that a reasonable man would have done to ascertain the truth of the charge before bringing the action.

Third—No man has a right to cause the arrest of another on mere suspicion. He must be in possession of facts which induce him to believe in the truth of the rumor. If he could have ascertained the facts by reasonable diligence, he is liable just as much as though he had ascertained the facts and still instituted the prosecution.

Fourth—If you cannot reconcile the action of defendant in the matter in any other way than by presuming him grossly ignorant, such ignorance will not protect him. Every man is presumed to know the law.

Fifth—On the question of malice you may also take into consideration the fact that defendant would earn some fees as an officer in serving the warrant and making the arrest complained of.

A. H. Tanner, for Appellant.

It is the duty of a peace officer to make complaint where he has reasonable cause to believe that a crime has been committed.

Argument for Respondent.

(*Glaze v. Whitley*, 5 Oreg. 164.) An action will not lie against one who in good faith makes complaint to a proper officer or tribunal upon which another is indicted or prosecuted, even though the act complained of did not constitute a crime. (*Dennis v. Ryan*, 65 N. Y. 385; 4 Wait Actions and Defenses, 339, and cases cited.) The first instruction above set up is radically wrong. In order to sustain an action for malicious prosecution there must be proof both of malice and want of probable cause. (*Harpham v. Whitney*, 77 Ill. 32; *King v. Colvin*, 11 R. I. 582; *Wicker v. Hotchkiss*, 62 Ill. 107; *Deitz v. Langfitt*, 63 Pa. St. 234.) The malice here referred to is express malice, as contradistinguished from malice in law. In other words, malice in this action is not derived from legal presumptions, it is always a question of fact. (*Sherman v. Dutch*, 16 Ill. 283; *Harkrader v. Moore*, 44 Cal. 144; *Oliver v. Pate*, 43 Ind. 132; *Newell v. Downs*, 8 Blackf. 523; *Griffin v. Chubb*, 7 Tex. 603; *Stewart v. Sonneborn*, 98 U. S. 187; *Turner v. Walker*, 3 Gill & J. 377; S. C. 22 Am. Dec. 329; *Trowman v. Smith*, 12 Am. Dec. 263, n.; *Glaze v. Whitley*, *supra*.) If there is a belief of guilt on the part of the prosecutor, based upon reasonable grounds, he is justified in making the complaint. (*Bacon v. Towne*, 4 Cush. 238; *Carl v. Ayers*, 53 N. Y. 17; *Farnam v. Feeley*, 56 N. Y. 451; *Graeter v. Williams*, 55 Ind. 461; *Shaul v. Brown*, 28 Iowa, 37.)

O. P. Mason, for Respondent.

It was not necessary to prove express malice. The instruction taken in connection with what was afterwards said upon the subject, was equivalent to saying to the jury that if they found there was no probable cause for the arrest they might infer malice from defendant's acts if they were rash, wanton, and wicked. (1 Hill. Torts, 420, § 10.) To establish probable cause the defendant must show, not that plaintiff was in fact guilty, but that the circumstances within defendant's knowledge were such as would lead an ordinarily cautious man to believe him guilty. (*Galloway v. Stewart*, 49 Ind. 156; *Harkrader v. Moore*, 44 Cal. 144; *Lamb v. Galland*, 44 Cal. 609.) The fact

Opinion of the Court—Waldo, C. J.

that the defendant sought the advice of a justice of the peace before acting is no defense. (*White v. Carr*, 71 Me. 555.)

WALDO, C. J.—This case comes up on the ruling sustaining the demurrer to the defendant's separate defense and misdirection of the jury at the trial. The demurrer was rightly sustained. It was no defense to the action that the defendant laid the facts within his knowledge before a justice of the peace, and acted on his advice in making the arrests. (*Olmstead v. Partridge*, 16 Gray, 381; *Brobst v. Ruff*, 100 Pa. St. 91; S. C. 45 Am. Rep. 358.) The instructions objected to were drawn by the plaintiff's counsel. That part of the first instruction, "if the defendant acted rashly, wantonly, or wickedly, the presumption of malice is conclusive," is objectionable. The statement is, indeed, supported by a *dictum* in *Travis v. Smith*, 1 Pa. St. 234. But in malicious prosecution the court cannot go further than to give a definition of malice; it is never an inference of law. In that action malice must be alleged and proved as an independent fact. (Denman, C. J., in *Mitchell v. Jenkins*, 5 Barn. & Adol. 593.) The jury are the exclusive judges of the malice of the defendant. (Washington, J., in *Munns v. Dupont*, 3 Wash. C. C. 37; *Stewart v. Sonneborn*, 98 U. S. 193.) "Whether malice existed or not is a matter of fact for the jury to decide, taking into consideration all the circumstances of the case. The question of probable cause is a mixed proposition of law and fact. Whether the circumstances alleged to show it probable or not probable are true and existed is a matter of fact; but whether supposing them true, they amount to a probable cause is a question of law to be decided by the court." (Duvall, J., in *Murray v. McLane*, 1 Brun. Col. Cas. 405; S. C. 5 Hall L. J. 515.) Taunton, J., in *Mitchell v. Jenkins*, above, refers to the distinction touching malice between ordinary actions of tort and actions of malicious prosecution. (And see Holmes Com. Law, 142.)

The jury, then, must find that the defendant was in fact actuated by a wrong motive. The instruction, on the contrary, makes malice a conclusion of law, placing it in this respect on the same footing with probable cause. The judge must say to

Opinion of the Court—Thayer, J.

the jury, "I tell you, if you think so and so, there is a want of reasonable and probable cause." (Coleridge, J., in *Haddrick v. Heslop*, 12 Q. B. 275.) That is, the jury must pass on the credibility of the testimony, not on its effect. But when the judge comes to malice, he must tell the jury malice is so and so, and leave it to them to draw their conclusions from the evidence. The jury are told substantially, by the third instruction, to find the defendant guilty should they find there was a want of probable cause, omitting the element of malice. In this there was a double error, as indicated above. "It is an action not to be favored, and ought not to be maintained without rank and express malice and iniquity." (Holt, C. J., in *Savill v. Roberts*, 12 Mod. 211.)

LORD, J., concurred.

THAYER, J., concurring.—From the evidence shown by the bill of exceptions I cannot see anything to justify the conclusion that the conduct of the appellant in the matter indicated malice. He was a peace officer, and these facts and rumors coming to him that the respondent had received this money, that it belonged to Mr. Scott, that the respondent was around gambling, and the questionable reputation he evidently bore in the community, were well calculated to excite suspicion. The appellant was doubtless hasty and imprudent in not having conferred with Scott upon the subject before instituting the proceedings; but that circumstance is a long way from establishing malice. There may have been no probable cause, in fact, for the arrest of the respondent, but it does not necessarily follow that the proceeding was instituted through malice. The plain, straightforward, and candid statement of the appellant in his testimony, as set out in the bill of exceptions, refutes the charge that he was actuated by any such motive, and if the case had been fairly submitted to the jury they would not have been likely to have arrived at any such conclusion; but they were told by the judge who presided at the trial that if the appellant acted rashly, wantonly, or wickedly, the presumption of malice was conclusive, and that he was responsible. The judge was doubtless authorized to charge

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as to the effect of rash or hasty conduct upon the part of the appellant, as the evidence showed that he did not consult Mr. Scott as to the affair; but he certainly had no right to instruct the jury as to any wanton or wicked acts of the appellant, unless there is other and quite different testimony from that set out in the bill of exceptions.

A court has no right to instruct a jury as to any fact unless there is evidence in the case that would justify their finding that such fact was true; but in no case had the court a right to tell the jury that rash acts would afford a conclusive presumption of malice. It is true, that the court, in another paragraph in the same instruction, advised the jury that the facts ought to satisfy any reasonable mind that the accused had no ground for the proceeding but his desire to injure the accused; but when that is taken in connection with the former part of the instruction, the jury would naturally have concluded that if the appellant acted rashly, wantonly, or wickedly, the facts would not only justify any reasonable mind in concluding that the accused had no ground for the proceeding except his desire to injure the accused, but that it would be conclusive upon that point. I think that instruction was clearly erroneous.

The next instruction complained of is to the effect that if the appellant could, with reasonable diligence, have ascertained the facts before he began the action he should have done so. The defendant, to rebut malice, when the plaintiff has made a *prima facie* case, must show that he did all that a reasonable man would have done to ascertain the truth of the charge before bringing the action. For what purpose this instruction was given would be very difficult to determine. The gist of the action on trial was whether the prosecution against the respondent was malicious, and without probable cause, and any fact which would not tend to prove that issue would be irrelevant. Whether the court intended to have the jury understand that if the appellant did not use reasonable diligence to ascertain the facts before he began the action they could infer malice, was left to speculation. That part of the instruction could not have been relevant for any other purpose, and it is very doubtful in my

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mind whether the inference indicated could have been drawn from the fact of a failure to exercise such diligence. Persons who act hastily and imprudently in such cases do not necessarily act from malicious motives.

The other proposition contained in the charge, that in order to rebut malice, when a *prima facie* case had been made, the party should have done all that a reasonable man would have done to ascertain the truth of the charge before bringing the action, was entirely too theoretical. What could the jury have understood by a *prima facie* case of malice, or what a reasonable man would have done under the circumstances? If the appellant had reasonable cause to believe that a crime had been committed, it was his duty to make the complaint. A deliberate and timid officer in such a case would be worthless; an offender would get out of the country before he would make up his mind what to do. Prompt and decisive action is highly necessary in such matters, and an officer should not be judged to have acted maliciously because he was expeditious. The instruction given to the jury, that "no man has the right to cause the arrest of another on mere suspicion; he must be in possession of facts which induce him to believe in the truth of the rumor. If he could have ascertained the facts by reasonable diligence, he is liable just as much as though he had ascertained the facts and still instituted the prosecution," was improper, and prejudicial to the appellant. It left the jury to infer that if the appellant made the complaint to the justice of the peace upon suspicion of the respondent's guilt, or without being in possession of facts which induced him to believe in the truth of the rumor he had heard, or if he could have ascertained the facts by reasonable diligence, he was liable. Admitting the existence of all the circumstances which would appear to have been assumed in the instruction, still the appellant was not necessarily liable, as he may, notwithstanding, have acted in good faith. Actual malice in such a case must be proved the same as fraud at law, not necessarily by direct evidence, but by such cogent facts as must necessarily establish it. The court had no right to infer malice upon any state of facts. That question was for the jury.

Another instruction given to the jury was improper. They were told by the court that if they could not reconcile the action of the appellant in the matter in any other way than by presuming him grossly ignorant, such ignorance would not protect him; that every man was presumed to know the law. It seems to me that the jury could only have understood from that instruction that the appellant's action in the matter had been most extraordinary and irregular, such as a grossly ignorant person might display, and that they had no right to reconcile it by a presumption of ignorance. It was an assumption upon the part of the court of the existence of a fact, when it should have been left to the jury to find whether or not such fact did exist.

The remaining instruction excepted to by the appellant's counsel was to the effect that upon the question of malice the jury might also take into consideration the fact that the appellant would earn some fees as an officer in serving the warrant and making the arrest complained of. This earning of fees doubtless referred to the fee of \$3.30 charged by the appellant. It is a very remote circumstance, and could not have been much of an inducement for the appellant to have instituted the prosecution; but it was fairly left to the jury, and could not have prejudiced the appellant. The court doubtless had the right to submit it to the jury for what it was worth.

The appellant has also assigned as error the ruling of the court upon the demurrer to the separate defense. The rule formerly was that in trespass to the person, or to personal or real property, the defendant, under the general issue of not guilty, could give in evidence matters which directly controverted the fact of his having committed the acts complained of. But where the act would *prima facie* appear to be trespass, and the facts stated in the declaration could not be denied, any matter of justification or excuse had to be specially pleaded. (1 Chitty Plead. 500.) Hence, where the defendant did the act at the request of the plaintiff, or the injury was occasioned by the latter's own default, it had to be so pleaded; and a special plea amounting to the general issue was good when it contained special matters

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of justification. If it went in avoidance of a material part of the declaration it was allowed, though as to some part of the declaration it only amounted to a denial. (Gould Plead. ch. 6, § 80.) The same principle exists under our Civil Code. The Code only attempted to change the form of the pleading in such cases. Instead of a special plea in bar, as formerly, the defendant avers new matter constituting a defense. This he may do in all cases of special matter of justification, although his answer in great part amounts only to a denial.

In a case like the one under consideration the defendant, under a simple denial, could only give in evidence matter which directly controverted the allegations of the complaint. He could not justify without alleging as a defense that he was an officer authorized to serve process; that such process had been duly issued to him; and that by virtue thereof he had arrested the plaintiff, and taken him before the magistrate, and imprisoned him, in order to hold him in custody, setting out the several acts with sufficient particularity, and averring that it was the same alleged arrest, etc. The separate answer in this case might have been sufficient if it had been definite and certain, and had shown that the appellant was in possession of facts authorizing the belief that the respondent had been guilty of a crime, and that he thereupon filed the information before the magistrate. He should have set out the facts as to what his information was which he alleged he believed constituted a crime, though if they had not been sufficient to have constituted a probable cause it would not follow that he was liable. There may have been no probable cause, and yet the act not have been malicious. Malice may be inferred from a want of probable cause, but it is not a necessary inference. The jury must be satisfied, from all the facts and circumstances of the case, that the party in such a proceeding has been actuated by bad motives—has sought to make use of the forms of law in order to gratify a malignant desire—before they are authorized to find malice. Hence, a party may be unable as a matter of law to justify the course he has pursued, and yet have a complete defense to such an action, and by skillful pleading present substantially to the

Points decided.

court the facts before alluded to under a form of denial; not, however, as some pleaders do, by denying the allegations of the complaint, except as thereafter admitted, and then set out an alleged separate defense, but by following a form of denial analogous to that used in courts of chancery, and from which the system of denial under the Code was borrowed. The denial does not have to be absolute, nor in any particular form. It must be in accordance with the truth of the facts; a denial with an *absque hoc*, as it was termed, expresses the idea intended to be conveyed.

In connection with the subject, it may be proper to suggest that the practice which prevails to a great extent of sustaining demurrers and motions to pleadings at *nisi prius* is in many instances very inconsiderate. The merits of a cause of action or defense are too often disregarded through a mere caprice. Courts ought to be extremely cautious in such matters. The object of a lawsuit is to settle differences between parties in accordance with justice, and that object should never be lost sight of in any case. A faulty pleading had better be endured, than a substantial right sacrificed. Our Code system was adopted in order to get rid of the hardships and technicalities of the system which preceded it, and to secure a more liberal method of administering justice.

The judgment appealed from should be reversed, and a new trial granted.

[Filed April 30, 1885.]

DAVID P. SHOOK v. JAMES H. COLOHAN.

APPEAL FROM DECREE—WHAT CONSIDERED ON.—The provisions of sections 527 and 534 of the Civil Code seem to restrict the power of this court upon an appeal from a part only of a decree to that part thereof specified in the notice.

RIPARIAN RIGHTS.—When a natural stream of water flows through the lands of different persons, each has the right to use it for the ordinary purposes of life—to drink it, use it for culinary purposes, and to water animals.

KLAMATH COUNTY. Defendant appeals. Decree modified.

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Opinion of the Court—Thayer, J.

The facts are stated in the opinion.

H. K. Hanna, for Respondent.

B. F. Dowell, and *P. P. Prim*, for Appellant.

THAYER, J.—This is an appeal from a decree of the Circuit Court for the county of Klamath. The respondent commenced a suit in that court against the appellant to enjoin him from obstructing the flow of an alleged stream of water from the appellant's land to that of respondent, and to have an account taken of damages alleged to have been sustained by the respondent in consequence of such alleged obstruction. It was claimed by the respondent that the water flowing from a certain spring, which takes its rise on the appellant's land in said county of Klamath, at a point some two or three hundred yards below the spring, divides into two branches of about equal volume of water, one of which flows off in a northeast course, and the other flows in a southeast course, across appellant's said land, and onto the land of the respondent, which joins that of the appellant on the south. And it was further claimed that the appellant so obstructed the said southeast branch in one way and another that it prevented the water thereof from reaching the land of the respondent, in consequence of which his crops of grass failed; that he was deprived of water for his cattle, was compelled to drive them a long distance for water, and lost several head by reason thereof. The appellant claimed that there never was but the one branch of said stream; denied that the water thereof forked at all; claimed that all the water from said spring naturally ran off through the northeast channel; that the so-called southeast channel was a slough or depression in the earth, which set in from near the channel of the spring, about at the point before referred to, and extended a southeast course therefrom to the respondent's land, but that there was naturally no connection between the head of the slough and the channel of the stream of water from the spring, and that no water flowed in said slough except surface water from the mountains, which ran down into it during the rainy season, or soaked in where the ground was wet;

that appellant, in order to irrigate his land, had built a dam in the channel of the said stream, by which he raised the water to such a height that it ran over the banks opposite the head of said slough, and by digging away the ground between the two points, had turned a quantity of water into the slough, and conveyed it onto his land between the slough and the branch from said spring.

The main question in the case is a determination as to the truth of these two views. It is very singular that a disagreement could arise regarding a fact so patent as the one suggested would appear to be; and yet each of the parties has been supported by such a number of respectable and intelligent witnesses that our decision upon the point is as liable to be wrong as right. The appellant bought out a former occupant of the land now owned by him, and upon which the spring is situated, in 1871; and he claimed that he went on the place in the spring of that year, and put in the dam, in order to force the water into the slough. His testimony is fair and intelligent. He must have known the condition of the water, and, ordinarily, his evidence would be entitled to full credit; but the former occupant, who took up the claim and resided upon it for several years, and was equally as well informed as the appellant, testified directly opposite to him; says that the stream from the spring did fork at the point referred to, and that there was a regular southeast channel, as well as the northeast one, from that point. Each party is supported by a large array of witnesses.

The disagreement between so many persons regarding a fact so easily ascertained and understood is, to my mind, an enigma. It was a case in which it would have been eminently proper to have called in a jury and had them view the premises; their judgment under the circumstances would have been far better than that of this court, made up, as it necessarily must be, from the depositions of the witnesses. The Circuit Court, after hearing the proofs in the case, found for the respondent, as to all matters except damages as alleged in the complaint, and as to damages it found for the appellant. And said court, among other things, decreed an injunction against the appellant, enjoin-

Opinion of the Court—Thayer, J.

ing him from erecting, continuing, or maintaining any dam or other obstruction of any kind in or across the channel or stream mentioned and described in the complaint as the southeast channel, or in any manner whatever continuing or contriving any obstruction to the natural flow of the water of the said stream in said channel. The appeal herein was taken from this part of the decree; and it is questionable whether this court has any right to review any other matter than that which is embraced therein, though the respondent's counsel seems to insist that we should consider the said question of damages, and, if the respondent is entitled thereto, to award them to him. My own opinion is that we have no right to review only the part of the decree appealed from, whereas in this case the appeal is not from the whole decree.

Subdivision 1 of section 527 of the Civil Code provides that "such notice [notice of appeal] shall state that the appellant appeals from the judgment or decree of the Circuit Court, or some specified part thereof." And section 534 of the Civil Code provides that "upon appeal, the appellate court may affirm, reverse, or modify the judgment or decree appealed from, in the respect mentioned in the notice, and not otherwise, as to any and all of the parties joining in the appeal, except a co-defendant of the appellant, against whom a several judgment or decree might have been given in the court below, and may, if necessary and proper, order a new trial." These two provisions, taken together, seem to restrict the review to the part of the decree specified in the notice, although the latter portion of section 533 of the Code provides that, upon an appeal from a decree given in any court, the suit shall be tried anew upon the transcript and evidence accompanying it. This would seem to imply that the whole case would be before the appellate court for trial *de novo*, though it might be a sufficient answer to repel the inference, that an appeal from a part of a decree is not "an appeal from a decree," within the meaning of the above provision; that said provision was only intended to apply to an appeal from an entire decree. Still, I think, a more satisfactory construction can be given to the provision, and make it harmonize with the

view I have indicated, by construing the several provisions together, and giving effect to all of them. Under such construction the conclusion would necessarily follow that the trial of the suit anew would be confined to a trial of the case affecting the part of the decree specified in the notice of appeal.

The other members of the court, however, are of the opinion that the damages claimed by the respondent are so remote and uncertain that they could not, consistently with the rules of law, be estimated by the court, and should not be considered. I concur also in that view, and it therefore becomes unnecessary at this time to decide whether we have authority to retry that part of the case or not. Upon the main question in the suit before alluded to, we have concluded that the Circuit Court was in a better situation to judge as to the credibility of the witnesses, and the subject-matter of the controversy, than this court is; and that the testimony in the case is so evenly balanced that we would not be justified in reversing the findings of that court. The decree of the court, however, is too general. It enjoins the appellant from damming or obstructing the natural flow of water in said southeast channel in any manner whatever. Said channel crosses the appellant's land, and he certainly is entitled to the usufruct of the water for his stock, and should have the right to make use of the channel to conduct water from the northeast branch of the spring onto his land. He owns the channel—the land part of it, as contradistinguished from the water—included within his own boundaries, and has a right to utilize it in any way he may see fit, consistently with the rights of others. In order to enjoy his rights, the appellant may be compelled to obstruct the water in said branch or slough; and it would be unjust to inhibit him from doing so. The respondent has no more right to the water naturally flowing there than the appellant has. It stands exactly upon the same footing with his. The decree should therefore be to the effect that the appellant be enjoined from appropriating or using the water naturally flowing in said southeast channel, beyond the reasonable use thereof as before indicated, and from damming or obstructing the flow of said water for any other purpose or to any greater extent.

Opinion of the Court—Thayer, J.

When a natural stream of water flows through lands belonging to different persons, each usually has the right to enjoy it for the ordinary purposes of life; the right to drink of it, to use it for culinary purposes, and to water animals. And it is conceded in this case that if there should be a surplus after these purposes were supplied, it could be legitimately employed for irrigation; and in applying it for this purpose it should be equitably divided between the several proprietors. The said stream in question may be sufficient, after furnishing the requirements mentioned, to afford water for irrigation. In such case the appellant should have the right to take his quota from the stream by any suitable means he might employ.

The decree of the Circuit Court will be modified in accordance with the principles of this decision, and in all other respects be affirmed. Neither party will be allowed costs upon this appeal.

[Filed April 30, 1885.]

ALICE M. AIKEN v. AI COOLIDGE AND M. J. ADAMS, Ex'rs.

PLEADING—DEFECT AFTER VERDICT.—After verdict, a party who alleges the insufficiency of a pleading is required to point out such a defect as the verdict will not cure, either that it states a defective title or no title.

EXECUTORS AND ADMINISTRATORS—CLAIM AGAINST ESTATE—OBJECTIONS TO, WHEN WAIVED.—Where the affidavit to a claim against the estate of decedent contains the substance of the statutory requirements, but the claim is irregular in form and is rejected by the administrator on that account, he should specify the nature of his objections. Otherwise he will be deemed to have waived them.

ID.—PRESUMPTION.—After verdict, when the contrary does not appear, it will be inferred that an administrator qualified immediately after letters issued to him.

MARION COUNTY. Defendants appeal. **Affirmed.**

The facts are stated in the opinion.

Tilmon Ford, and *Rufus Mallory*, for Appellants.

N. B. Knight, and *W. G. Piper*, for Respondent.

THAYER, J.—The respondent alleges in her complaint that said George E. Aiken died in said county on the 23d day of

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November, 1883, intestate; that said appellants on the 29th day of December, 1883, were duly appointed by the county court of Marion County administrators of the estate of said decedent; that on the 31st day of December, 1883, letters of administration were issued to the appellants by the said county court; that thereafter the appellants duly qualified and entered upon the discharge of their duties as such administrators, and ever since had been and were duly qualified and acting as such; that at the time of his death the said George E. Aiken left surviving him the respondent, his widow; that during his life, and on or about the 23d day of March, 1882, the respondent loaned him \$4,500, to be repaid to her on demand, with interest, and on the — day of May, 1884, the respondent presented to the appellant, as such administrator, for allowance, the said claim, duly verified by her affidavit, and demanded its allowance, but that they refused to allow it, and rejected said claim. A copy of the claim, as presented to the said administrators, was attached to the complaint as an exhibit. The complaint contained the usual allegations of non-payment of the claim, and prayer for relief. The appellants interposed a demurrer thereto upon the grounds that it did not state facts sufficient to constitute a cause of action, which, having been overruled, they filed an answer controverting the allegations of the complaint. The issue so formed was tried by a jury, who returned a verdict for the said amount of said claim; whereupon the judgment appealed from was entered.

The case comes here simply upon the pleadings and judgment, no bill of exceptions having been made. The grounds of error relied upon are confined to alleged defects in the complaint, one of which is the form of the claim alleged to have been presented to the appellants, as such administrators, and the other is that the complaint does not show that six months had expired after the granting of the letters of administration, and before the time of the commencement of the action. The appellants, after their demurrer to the complaint was overruled, answered over. This did not waive any

Opinion of the Court—Thayer, J.

defects in the complaint, but, after verdict, the court will give every reasonable intendment in favor of it. At such a stage of the proceeding, a party alleging the insufficiency of the pleading is necessarily required to point out such a defect as the verdict will not cure. It must be shown to contain a defective title, or that it totally omits to state any title or cause of action. It will not be sufficient in such a case to show a defective statement of a title or cause of action. (*Stennell v. Hogg*, 1 Saund. 228, notes *b* and *c*; and also *n. m.*)

The objection to the form in which the claim is stated, if well taken, would go to the cause of action, and render the complaint defective. But we do not think that the objection in this case was fatal. The claim was not made out in the usual way. The ordinary mode in making out claims against the estate of a deceased party is to state an account, and then verify it. In this case the claim was included in a general affidavit. The respondent deposed to the fact that the estate was indebted to her in the amount; that there were no legal set-offs or counter-claims existing against it; that no payment had been made thereon, and that the amount was due her. This is the substance of the statutory requirements. Besides, the appellants ought not to be permitted to complain upon that ground. They rejected the claim generally. Their refusal to allow it should have been for the special reason that it was not formally made out, otherwise they should be deemed to have waived the objection.

The other ground of objection to the complaint, that it does not show that six months intervened between the granting of letters of administration and the time of the commencement of the action, is untenable. The record shows that more than six months elapsed between the issuance of the letters and the commencement of the action, although the complaint does not show the particular time when the appellants qualified; but we are of the opinion that after verdict it will be inferred that they qualified immediately after the letters issued. It certainly was their duty to have done so; and we think, under the circumstances, we may presume that they performed their duty. They

Points decided.

knew when they did qualify, and could have averred that the period had not expired in which they were exempted by law from being sued. If the questions were new, I should be inclined to hold that, unless it appeared upon the face of the complaint affirmatively that the action had been commenced within the six months, the appellants would have to interpose a plea in the nature of a plea in abatement, setting forth the fact, and that by answering to the merits they would be deemed to have waived the point. I regard the matter as only dilatory; but in the case of *Wells v. Applegate*, 10 Oreg. 519, this court seems to have placed its decision of a similar question upon other grounds. The appellants, instead of setting up in their answer the fact alluded to, traversed the general allegations of the complaint. Individually I am inclined to the opinion that would waive any objection of that character. However, as the court can infer that the appellants qualified at once after letters of administration issued to them, as before concluded, it is not necessary to consider the matter of abatement.

The record fails to disclose any error; and the judgment appealed from will therefore be affirmed.

[Filed May 4, 1885.]

E. P. WALTS ET AL. v. C. M. FOSTER ET AL.

12	247
25	129
7*	24
35*	176

INJUNCTION—HIGHWAY—OBSTRUCTION OF.—An injunction to prevent the obstruction of an alleged street or highway will not be allowed, unless the right to the use of the street or highway as such is admitted or has been established at law, or is clear and easy of ascertainment.

IN.—TEMPORARY INJUNCTION PENDING LEGAL PROCEEDINGS.—When the emergency is pressing, and a *prima facie* case is presented, a temporary injunction may be granted pending legal proceedings to determine the rights of the parties.

BAKER COUNTY. Defendants appeal. Bill dismissed without prejudice to plaintiffs' right to assert their rights at law.

The facts sufficiently appear in the opinion.

T. C. Hyde, for Respondents.

Opinion of the Court—Lord, J.

Where an adjoining lot owner has suffered special injury by the obstruction of a street, he may maintain suit; an injunction is the proper remedy. (*Kittle v. Pfeiffer*, 22 Cal. 484; *Williams v. Smith*, 22 Wis. 594.) Nor is absolute title to the lots necessary in such suit; ownership of the buildings and possession is all that is necessary. (*Williams v. Smith*, *supra*.)

Haines & Williams, and *Wm. M. Ramsey*, for Appellants.

It is necessary generally that a private person seeking an injunction to restrain a private nuisance first establish his right *at law*, and where the right is *doubtful* and *has not been established at law* an injunction will be withheld. (*Irwin v. Dixon*, 9 How. 29; *Mayor v. Curtiss*, Clarke Ch. 336; *Rhea v. Forsyth*, 37 Pa. St. 503; *Arnold v. Klepper*, 24 Mo. 273; *Porter v. Witham*, 17 Me. 292; *Mammoth, etc. Co's. Appeal*, 54 Pa. St. 183; *Van Bergen v. Van Bergen*, 3 Johns. Ch. 282; Code, § 330, p. 179.)

LORD, J.—This is a suit for an injunction to enjoin the defendants from obstructing an alleged street or highway. The plaintiffs base their right to the relief sought upon the ground that they are the owners and occupants of certain lands abutting such alleged street or highway; that they have a special interest in the uninterrupted and undisputed use of the same as indicated in their complaint; that said street or highway had been dedicated by their grantors to the public, and constituted a part of the consideration for their purchase of said lands; and that the defendants avow their purpose, and will, if not restrained, permanently obstruct the same by the erection of a fence and building thereon. The answer denies nearly all the allegations of the complaint, and sets up new matter, most of which is controverted by the reply.

There is but one question presented by this case, and that is, is the *locus in quo* a public street or highway? Has it been dedicated as such to the public? When this point is established or adjudicated, it is not disputed that if the plaintiffs, as adjacent owners, suffer an injury distinct from the public, as a con-

Opinion of the Court—Lord, J.

sequence of such obstruction, equity will afford relief and abate such nuisance. We are therefore confronted with the inquiry, at the threshold of the case, whether equity will intervene when the right to the use of the *locus in quo* is in dispute, and must first be investigated and judicially determined before the plaintiffs can be properly regarded as such adjacent owners, and entitled to the relief sought by reason of special injuries sustained or justly apprehended as a result of such obstruction. When the right to the use of the street is admitted, or easy of ascertainment, an injunction will be granted to restrain its obstruction by building a house thereon, in favor of adjacent owners, when such obstruction works a special injury to them. (*Corning v. Lowerre*, 6 Johns. Ch. 439; *Luhrs v. Sturtevant*, 10 Oreg. 171; *Shed v. Hawthorne*, 3 Neb. 179.) But where the right to the use of the street or highway has not been established at law, or is not clear nor easy of ascertainment, but is questioned and contested on every ground on which the plaintiff puts it, not only by the answer of the defendants, but by the proofs in the suit, the remedy by injunction will not be granted. (High Injunc. §§ 816, 820; 2 Story Eq. Juris. § 924, n.)

A brief reference to a few adjudicated cases and the authorities cited will illustrate this principle:—

In *Rhea v. Forsyth*, 37 Pa. St. 506, Woodward, J., in delivering the opinion of the court, said:—

“From these and many more authorities, which might be cited to the same effect, it is apparent that where the plaintiff’s right has not been established at law, or is not clear, but is questioned on every ground on which he puts it, not only by the answer of the defendants but by the proofs in the cause, he is not entitled to remedy by injunction. It is not enough that he is able to produce some evidence of his right, when there is conflicting evidence that goes to the denial of all right. In such case the plaintiff should first establish his right in an action at law, and then come into chancery, if necessary, for the protection of the legally established right.”

And again:—

“In the case before us the plaintiff rested his case on two

Opinion of the Court—Lord, J.

grounds: *First*, the use and occupation of the alley by several occupants of adjacent buildings for more than twenty-one years; and *second*, the joint dedication of several lot-owners of this alley in 1849 to their common use. But both grounds were denied by the defendant in his answer, and there was conflicting evidence in regard to both. It is not worth our while to go through and discuss the testimony, for the question of fact ought not to have been brought here for us to decide. Neither the equitable jurisdiction of the court below, nor our jurisdiction, can properly attach until the plaintiff has established his right at law. Has the alley been in common use so long that the successors in the title may set up a presumption of a grant? If not, did the defendant dedicate it to the use of the plaintiff's lot? These are questions for a court and jury to decide in an action at law."

See also *Bunnell's Appeal*, 69 Pa. St. 59; *Commonw. v. Rush*, 14 Pa. St. 192.

In *Green v. Oakes*, 17 Ill. 250, an injunction was granted for obstructing a public road, in which the answer denied that the road is a public highway, or has been used as such for twenty years. But the evidence showed that the road had been used as a public highway of the county, with the knowledge and consent of the owners of the land over which it runs, for more than twenty-one years, and had been worked and treated by the authorities having jurisdiction of roads as one of the public roads of the county. In fact, there was not only no conflict of evidence, but no evidence whatever against the existence and use of the road as alleged, which, for the purposes of the case, was practically admitted, and the remedy by injunction was sought to be avoided upon other grounds. In the course of his opinion Skinner, J., said:—

"If equity will grant relief by injunction in favor of an individual interested against one about to shut up the road, *and it is one of the public highways of the county*, then the Circuit Court should have made the injunction perpetual, instead of dismissing the bill. Although courts of equity will not interpose by injunction to prevent an obstruction of an alleged case-

ment or way, or the creation of a nuisance or purpresture, when the right was *doubtful*, and there is a remedy at law, yet where the right is *clear* and appertains to the public, and an individual is directly and injuriously affected by the obstruction of the easement, or the creation of the nuisance, they will interfere on the application of such individual to prevent the threatened wrong or invasion of the common right."

And again:—

"Where the facts are easy of ascertainment, and the rights resulting therefrom free from difficulty, equity will grant relief, either at the suit of the public, or of the citizen having an immediate interest therein."

To the same effect is the case of *Keystone Bridge Co. v. Summers*, 13 W. Va. 485, in which the court say:—

"But if the right of the public to the use of the highway is clear, and a special injury is threatened by an obstruction of the highway, and this special injury is serious, reaching the very substance and value of the plaintiff's estate, and is permanent in its character, a court of equity, by an injunction, ought to prevent such nuisance."

See also *Dunning v. Aurora*, 40 Ill. 481; *Higbee v. Camden & A. R. & T. Co.* 20 N. J. Eq. 435; *Luhre v. Sturtevant*, 10 Oreg. 174; Pom. Eq. Juris. §§ 1346, 1347, notes.

The general rule, therefore, would seem to be that where the existence of the right to the use of the highway as such is admitted, or the right is clear or easy of ascertainment, and free from all reasonable doubt, and the obstruction of it seriously affects the value and substance of an individual's estate, equity will afford relief by injunction. But, conversely, it will be refused. The jurisdiction of the court is exercised rather to protect acknowledged rights than to establish new and doubtful ones. "The court," said Ellsworth, J., "doubtless possesses the necessary power, but it is not to be exercised as a matter of course, even when the plaintiff suffers some injury to his real estate. Whenever the right is doubtful, or needs the investigation of a jury, a court of equity is always reluctant to interpose its summary authority, for it is rather the duty of the court to

Opinion of the Court—Lord, J.

protect *acknowledged rights* than to establish new and doubtful ones." (*Roath v. Driscoll*, 20 Conn. 538; *Burnham v. Kempton*, 44 N. H. 92.)

Now, what is this case? The facts disclosed by the record, which are uncontroverted, show that the lands purchased by the plaintiffs were sold by metes and bounds, and without reference to any plat made by the plaintiffs' grantor, upon which such alleged street was located. No lots or blocks were made by monuments on the ground, and no plat thereof was ever made or rendered; nor have the public authorities, to whom is intrusted the jurisdiction of public roads, ever worked or treated the alleged road or highway as a public street, but it is alleged in the complaint have neglected and refused to act upon the petition of the plaintiffs in the premises. Upon the question of dedication, we shall refrain from the expression of any opinion, except to say that the evidence is conflicting and hopelessly irreconcilable. Upon the one hand, the plaintiffs' evidence tends to show by acts and declarations that the *locus in quo* was dedicated as a public street, or at least as an easement to their common use as adjoining land-owners. The case in this regard is somewhat analogous to the facts in *Rhea v. Forsyth*, *supra*. And upon the other hand, the defendants claim to be the legal owners of the land in dispute, and with much evidence, endeavor to contradict and contest every ground upon which the plaintiffs put their right to the use as alleged. As applicable to this case, we adopt the language of the court in *Hacker v. Barton*, 84 Ill. 314, as peculiarly appropriate:—

"The evidence in this record is as conflicting and antagonistic as are the opposing interests of the parties litigant. Without intending to say anything that might in the slightest degree affect the right of either party in any action at law, we may say both propositions asserted and denied in the respective pleadings, viz., ownership of the land and the fact of dedication to public uses, are so much involved in doubt they ought to be made subjects of investigation in appropriate actions at law. Especially in regard to the alleged fact of the

Points decided.

dedication of the land to public uses, there is irreconcilable conflict in the testimony. That of one party must be rejected, and that is always a matter of great delicacy with the court trying cases as a chancellor. When the questions indicated upon which the whole controversy depends have been settled in a court of law, either party might appropriately invoke the aid of a court of chancery to prevent vexatious litigation in regard to the same subject-matter."

Where the emergency is pressing, and a *prima facie* case is presented, a temporary injunction may doubtless be granted until the legal right of the parties may be determined. But the object here is to make the injunction perpetual in the suit, the manifest object of which is to adjudicate title to the *locus in quo*. In cases of this character, when the rights of the parties are not clear, but involved in doubt and uncertainty, it presents a subject peculiarly appropriate for the investigation of a court and jury. The bill must therefore be dismissed, without prejudice to whatever rights the plaintiffs may desire to assert at law.

[Filed May 4, 1885.]

SARAH McINTYRE v. JACOB KAMM AND S. W. BROWN.

CONVEYANCE—PROOF OF—CERTIFICATE—WHAT TO CONTAIN.—In making proof of an unacknowledged deed (under § 17, tit. 1, ch. 6, Misc. Laws) it is necessary not only that the witness should be sworn, but that that fact should be stated in the certificate.

CONSTRUCTION OF STATUTE—CONSTRUCTION OF ANOTHER STATE.—The adoption by the legislature of this State of a statute of another State gives to the practice and decisions of the latter, made prior to the enactment of our statute, the weight of authority in its construction.

- LEGAL TITLE—NOTICE—CONSIDERATION—PLEADING—BURDEN OF PROOF.**—In a controversy between two persons, each claiming the legal title, the defendant may assail the plaintiff's title on the ground either of notice, or want of consideration. But in such case he must allege and prove the facts invalidating such title.

MULTNOMAH COUNTY. Plaintiff appeals. Affirmed as to lot 6, and reversed as to lot 5, of the tracts in controversy.

12	253
21	306
7*	27
28*	9
12	253
23	18
7*	27
35*	178
12	253
43	277

Statement of Facts.

Ejectment. The complaint is in the usual form. The answer consists simply of denials and a plea of the Statute of Limitations.

At the trial the appellant gave in evidence, (1) a patent from the United States to Alexander Brown and wife under the donation law of September 27, 1850, including the premises in controversy; (2) a decree of the county court of Multnomah County, made at the April term thereof, 1859, by which the east half of said claim was partitioned among the children of said Alexander Brown, then deceased. In order to make the partition, said east half of the claim was divided into parcels, numbered respectively from one to six, inclusive, and designated as lots, two of which, lots 5 and 6, are the parcels in controversy. Lot 6 was set apart to Sarah McIntyre, the appellant, a daughter of the deceased, and lot 5 was set apart to another daughter, Nancy J. Brown, now Nancy J. Dray; and (3) a warranty deed to said lot 5 from Nancy J. Dray and her husband, dated December 18, 1883. The respondent then offered in evidence a writing, under seal, which they claimed to be a deed to said lot 5 from said Nancy J. Brown to William Stevens. The instrument was not acknowledged, but an attempt had been made to prove its execution, which was indorsed thereon as follows:—

“State of Oregon, county of Multnomah. I, F. R. Strong, a notary public in and for said county and State, do hereby certify that on this 21st day of September, 1883, personally appeared before me P. A. Marquam, one of the subscribing witnesses to the above and foregoing deed, and acknowledged to me that he resides in the county of Multnomah and State of Oregon, and has resided in said county and State for a long time prior to the date of said deed, and that he personally knew Miss Nancy J. Brown, the person described in and who executed said conveyance, and that the above and foregoing deed was signed and executed by Miss Nancy J. Brown, the grantor named therein, on the 26th day of October, 1864, the day it bears date, and that the said P. A. Marquam and one G. B. Gray, at the request of said Nancy J. Brown, and in her presence, signed our respective names as witnesses thereto; and

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thereafter said deed was delivered by said Nancy J. Brown to said William Stevens, the grantee named therein. And I further certify that I am personally acquainted with said P. A. Marquam, the said subscribing witness, and have been so personally acquainted with him for over fifteen years.

"In witness whereof, I have hereunto set my hand and seal the day and year in this certificate first above written.

[NOTARIAL SEAL.]

"F. R. STRONG,

"Notary Public for Oregon."

During the trial a certificate was obtained from T. A. Wood, a notary public, and indorsed upon the deed, which was intended to obviate the objections to the foregoing. The deed thus certified was admitted against the appellant's objections. The respondent then offered in evidence what was claimed to be a deed from the appellant to William Stevens to said lot 6. The descriptive part of the deed is as follows:—

"All the right, title, and interest of the said Sarah Brown in and to the donation land claim of Alexander Brown, deceased, late of Multnomah County, in the State of Oregon, and more particularly designated and known as lot No. 5 of said donation land claim, as surveyed, designated, and set apart to the said Sarah Brown, heir-at-law of said Alexander Brown, deceased, by the Probate Court of said Multnomah County, in the State of Oregon; reference thereunto being had, as will more fully appear in the records of said court."

This deed was also admitted in evidence against the appellant's objection. The plaintiff offered to show in rebuttal that this deed had been obtained by fraud of the grantee in misrepresenting the contents. The evidence was objected to and excluded by the court. Upon these facts the court directed a verdict for the respondents, and from the judgment entered thereon this appeal is taken.

A. H. Tanner, and R. E. Bybee, for Appellant.

The execution of a deed can be proven only by the affidavit or deposition of the witness. (Civ. Code, §§ 798, 802, 804; *Rushin v. Shields*, 1 Ga. 636; S. C. 56 Am. Dec. 436, n.) The

Argument for Appellant.

certificate of the notary public to the deed from Mrs. Dray is clearly insufficient. (Misc. Laws, p. 517, §§ 17, 18.) The deed then not being acknowledged or proven as required by law was not entitled to record, and was not constructive notice to the plaintiff of any claim or title to the premises by the defendants. (Wade Notice, §§ 112, 124, 125; *Musgrove v. Bonser*, 5 Oreg. 313; *Rushin v. Shields*, *supra*; *Eaton v. Freeman*, 63 Ga. 535; *Taylor v. Harrison*, 47 Tex. 454; S. C. 26 Am. Rep. 304, n.; *Bishop v. Schneider*, 46 Mo. 472; S. C. 2 Am. Rep. 533.) Possession at most is only evidence tending to show actual notice; it is by no means conclusive. (*Sibley v. Leffingwell*, 8 Allen, 584; *Dooley v. Wolcott*, 4 Allen, 406; *Mara v. Pierce*, 9 Gray, 306; *Pomroy v. Stevens*, 11 Met. 244; *Beattie v. Butler*, 21 Mo. 313; *Williamson v. Brown*, 15 N. Y. 354; *Vaughn v. Tracy*, 22 Mo. 415; 25 Mo. 318.) The authorities are quite uniform in holding that possession for the purpose of notice must be actual, open, notorious, continuous, and exclusive. (Bigelow Fraud, p. 294; *Brown v. Volkening*, 64 N. Y. 76; *Kendall v. Lawrence*, 22 Pick. 540; *Bohlman v. Coffin*, 4 Oreg. 313; *Pope v. Allen*, 90 N. Y. 298.) And the burden was on the defendants to show that their possession was such as constitutes actual notice. (*Brown v. Volkening*, *supra*; *Kendall v. Lawrence*, *supra*; *Musgrove v. Bonser*, 5 Oreg. 316.) Under the rules for construing the descriptive part of a conveyance prescribed in section 845 of the Civil Code, the deed from appellant to William Stevens cannot be treated as a conveyance of lot 6 in controversy. (*Board Land Com. v. Wiley*, 10 Oreg. 86, and cases there cited; *Hathaway v. Juneau*, 15 Wis. 264; *Smith v. Strong*, 14 Pick. 128; *Morrell v. Fisher*, 4 Ex. 604; *Webber v. Stanley*, 16 Com. B. N. S. 755; *Rutherford v. Tracy*, 48 Mo. 325; 1 Greenl. Ev. § 301.) The designation of a lot of land by its name or number must be regarded as the prominent object or monument, and where there is uncertainty the monument must prevail over courses and distances. (*Rutherford v. Tracy*, *supra*; *Myers v. Ladd*, 26 Ill. 417; *Lodges' Lessee v. Lee*, 6 Cranch, 237; *White v. Gay*, 9 N. H. 126; *Union Railway Co. v. Skinner*, 9 Mo. App. 189.) Fraud in obtaining the execution of a con-

Argument for Respondents.

veyance may always be shown at law. (*Farley v. Parker*, 6 Oreg. 105; *Smith v. Cox*, 9 Oreg. 475.) Such a deed is absolutely void against the party defrauded. (*Thompson v. Drake*, 32 Ala. 99; *Somers v. Pumphrey*, 24 Ind. 231; *Gwin v. Hodge*, 4 Jones (N. C.) 168; *Montgomery v. Pickering*, 116 Mass. 227; *Young v. Pate*, 4 Yerg. 164; Bigelow Fraud, p. 156.) The defendants cannot claim to be innocent purchasers for a valuable consideration without notice, first, because their immediate grantor held under a quit-claim deed; and secondly, because before they can invoke that doctrine they must have acquired the legal title as well as an equitable right to the property. (*Baker v. Woodward*, 12 Oreg. 3; *Trustees v. Wheeler*, 61 N. Y. 117; *Hallett v. Collins*, 10 How. 174, 186; Bigelow Fraud, p. 315.) It was unnecessary for plaintiff to plead the fraud relied upon to impeach the deed. (*Morgan v. Bishop*, 61 Wis. 407.)

Joseph Simon, for Respondents.

The deed from Nancy J. Brown to Wm. Stevens is duly proved, and such proof stands in lieu of an acknowledgment. (Ch. 6, Misc. Laws, §§ 17, 21; *Myrick v. McMillan*, 13 Wis. 188; *Cutlin v. Washburn*, 3 Vt. 24; *Dana v. Bank etc.* 5 Watts & S. 223; *Wilson v. McEwan*, 7 Oreg. 87.) It was not necessary that the witness proving the deed should sign the probate. The certificate of the officer taking the proof has universally been held sufficient. (*Dana v. Bank etc. supra*; *Carpenter v. Dexter*, 8 Wall. 513.) The signature of Nancy J. Brown being admitted, her deed was admissible in evidence even if not properly proven. It was sufficient to pass the legal title to the land, and was good without proof against the plaintiff, who had notice of it. (*Goodenough v. Warren*, 5 Sawy. 494; *Marshall v. Fisk*, 6 Mass. 24; *Buck v. Babcock*, 36 Me. 491; *Wark v. Willard*, 13 N. H. 389; *Semple v. Miles*, 2 Scam. 315; *McConnell v. Reed*, 2 Scam. 371; *Scard's Lessee v. Davis*, 6 Peters, 124.) Where the description consists of several parts, some of which are incorrect, mistaken, or false, if it can be ascertained what was intended to be conveyed, the property will pass. (*Board School Land Commrs. v. Wiley*, 10 Oreg. 86; *Raymond v. Coffey*,

Opinion of the Court—Waldo, C. J.

5 Oreg. 132; *Drew v. Drew*, 28 N. H. 496.) Parol evidence is inadmissible in an action of ejectment to impeach title deeds regular upon their face, or to show that the grantor intended to convey a different tract from the one mentioned in the deed. (*Dolph v. Barney*, 5 Oreg. 191; *Norwood v. Byrd*, 1 Rich. 135; S. C. 42 Am. Dec. 406.) The ambiguity, if there was any, was patent, and parol evidence could not be admitted to explain it. (*Marshall v. Haney*, 4 Md. 498; S. C. 59 Am. Dec. 92; 1 Greenl. Ev. § 297.)

WALDO, C. J.—The practice of proving a deed for the purpose of having it recorded grew up in New York in colonial times as a part of the common law of the State. (*Van Cortlandt v. Tozer*, 17 Wend. 338; S. C. 20 Wend. 423.) We have no such common-law practice in this State. We doubtless take judicial notice at common law of what is termed “an acknowledgment of a deed.” (*Morris v. Wadsworth*, 17 Wend. 113; *Pidge v. Tyler*, 4 Mass. 541.) But apart from the express enactment of our statute, we do not know what is intended by the expression “proving a deed” for purposes of registration. Nevertheless, the legislature, in enacting the statute, seemed to have supposed that they were legislating upon a subject well understood in the law, and hence, doubtless, arose what is obviously an imperfect explanation of the mode in which proof shall be made, and the manner in which it shall be certified. The term is first seen in the Laws of Oregon Territory of 1854, page 478, and, as may be drawn from the preface and the marginal references of the text, was a transcript from the laws of New York. That fact, under the circumstances attending the publication of the laws of that year, gives to the decisions and practice of the courts of New York prior to the enactment of our statute the weight of authority in its construction. According to the practice in that State, which may be taken as a declaration of the law, it seems to have been necessary, not only that the witness should be sworn, which might seem otherwise obvious, but that that fact should be stated in the certificate. (*Jackson v. Livingston*, 6 Johns. 149; *Jackson v. Osborn*,

2 Wend. 555; *Bradstreet v. Clarke*, 12 Wend. 673; *Norman v. Wells*, 17 Wend. 137; *Van Cortlandt v. Tozer*, 17 Wend. 338; *Carver v. Jackson*, 4 Peters, 82.)

The case of *Hunt v. Johnson*, 19 N. Y. 292 (not cited by counsel), seems, indeed, to support the defendant's position, that the certificate need contain only what the statute expressly specifies it should contain. But the decision seems to overlook the fact that there was a law governing the subject in New York prior to the statute, which should be considered in the construction of the statute; and also seems to have overlooked what seems to have been a uniform practice the other way. Nor can the decision be upheld on principle, which requires the facts to be stated in the certificate, that the court may see that the deed was duly proved. (Marshall, C. J., *Ross v. McLung*, 6 Peters, 287.) The power of the officer in taking the proof may be likened to that of an inferior court, "which ought not to show things only by implication, but ought to show them expressly." (*Barnaby v. Goodale*, Style, 2.)

It is sufficient at present, without examining the certificate in other particulars, that the certificate must be held bad because it does not show that the witness was sworn, and on this ground it was rightly excluded by the court below. The result was that the record title was in the plaintiff. It followed, then, that if the certificate of the notary Woods, made at the trial, was otherwise valid, no other effect could be given to it than if the witness himself had been produced, and proved the deed at the trial. On this point we agree with Mr. Justice Campbell in *Shotwell v. Harrison*, 22 Mich. 423, that the recorded deed is *prima facie* evidence of everything necessary to give it validity. This being a controversy between legal titles, the defendants could have assailed the plaintiff's title on the ground of notice or want of consideration at law. (*Jackson v. Burgett*, 10 Johns. 457.) But the burden was on the defendants to set up the facts invalidating the plaintiff's title, and to prove them at the trial. (*Moore v. Thomas*, 1 Oreg. 201; *Ryder v. Rush*, 102 Ill. 340.) As this was not done, it was error to admit the deed on the Woods' certificate alone, and direct a verdict for the defendants as to said lot.

Opinion of the Court—Thayer, J.

The description in the deed from Sarah Brown to William Stevens was sufficient to convey lot 6. The case comes within the rule laid down in *Stukeley v. Butler*, Hob. 172, where, showing that a contradictory explanatory clause will not avoid what was sufficiently granted before, it is said:-

"As, if I have in D blackacre, whiteacre, and greenacre, and I grant unto you all my land in D—that is to say, blackacre and whiteacre—yet greenacre will pass too."

And see *Bell v. Potts*, 5 East, 49; *Jackson v. Loomis*, 18 Johns. 81; *Worthington v. Hylyer*, 4 Mass. 196; *Raymond v. Coffey*, 5 Oreg. 132.

It follows that the judgment of the court below must be affirmed as to lot 6, and reversed as to lot 5, and a new trial ordered, with leave to the defendants to apply to the court below for leave to amend their answer.

[Filed May 11, 1885.]

ANTHONY MOORE v. LEVI KNOTT AND LEVI ESTES.

PARTNERSHIP.—Where articles of partnership provide that in case of a sale of the partnership property at any time before the expiration of the partnership, the proceeds of the sale shall be divided equally between the partners, one of the partners cannot be deprived of his right to such a distribution without his consent.

MULTNOMAH COUNTY. Anthony Moore and Levi Estes each appeal. Decree modified in accordance with opinion.

George H. Williams, for Respondent Anthony Moore.

Alfred F. Sears, Jr., and *R. Williams*, for Appellant.

H. T. Bingham, for Respondent Knott.

THAYER, J.—This appeal is from a decree of the Circuit Court for Multnomah County. The respondent Moore commenced a suit against the respondent Knott and the appellant

Opinion of the Court—Thayer, J.

Estes in that court, for an accounting arising out of partnership affairs between the parties. It appears from the transcript that said parties, on the 15th day of April, 1882, entered into written articles of copartnership in the steam saw-mill business for the purpose of manufacturing and selling lumber. The partnership was to continue for the period of ten years from the 1st day of March, 1882, and be binding upon the legal representatives. The saw-mill was to be erected on the premises known as the "Nicolai Mill," at Albina, in said county, and Knott and Estes were to allow the firm the use and occupation of the premises under lease, which the articles stated were then held by said Knott from Nicolai. Said Knott and Estes were to pay all rent and other taxes and expenses agreed to be paid by the lessee under said lease without charge to the firm; the partnership to pay the taxes against the mill and machinery. Said Knott and Estes were also, at their own cost and expense, to make an addition of eighteen or twenty feet to the east end of the mill building for the edger. Moore agreed, at his own cost and expense, to take down the mill then standing on the McNulty Creek, back of St. Helen's, in Columbia County, Oregon, and at his own cost and expense to move the boiler, engines, and all the other machinery pertaining to said mill, and also the blacksmith tools and appliances, to said Nicolai mill premises, and there erect the same at his own cost and expense, and put said engine and machinery, and the blacksmith shop, in good running order; but that if, at any time during the continuance of the said partnership, it should be deemed expedient by all the partners, or their representatives, to make additions to said mill building, or to purchase and operate other additional machinery therein, such addition should be built and such additional machinery be purchased at the joint cost of all the partners, each to pay ratably his proportion of one third thereof. Said articles also contained the following clause, viz.:—

"In case of a sale of the mill and lease at any time before the expiration of the time to which the partnership is limited, the proceeds of such sale shall be divided equally between the partners; but if the said mill and lease is not disposed of during

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said partnership, then at the end of ten years Anthony Moore shall have and then retain all the machinery, engines, boilers, etc., put into the mill by him; and such additional machinery as may have been purchased and put into the mill shall be sold, and the proceeds of the sale shall be divided equally between the partners."

It was further stipulated therein that in case of the destruction of the mill by fire the partnership should at once terminate, and the said Knott and Estes should become again solely entitled to the benefits of the lease for the remainder of the term. There are also many other provisions in said written articles, but it is not necessary to refer to them for the purposes of this decision. The said parties, after concluding the said articles of copartnership, engaged in the business therein mentioned, and prosecuted it until March 13, 1883, when the partnership was dissolved. That the said Moore, in pursuance of the said articles, took down his said mill, and at his own cost and expense moved the said boiler, engines, and other machinery to said Nicolai Mill premises, and put the same in good running order. That on or about the said 13th day of March, 1883, said parties sold the said mill and machinery for the sum of \$16,000. It was claimed by said Moore that said sum was received by the said Knott, and the further sum of \$1,418.25 on account of the sale of certain wood and lumber belonging to the said firm, and also that prior to and at the time of the sale of said mill it was agreed by the said Knott, with the knowledge and consent of said Estes, to pay him from said proceeds of said sale the sum of \$6,400 on account of his said boiler, engine, and the other machinery so furnished by him and erected in the said mill; and it was claimed by the said Estes that by an arrangement made between him and Knott, soon after the formation of the partnership, he acquired the interest of Knott therein, and that he was, at the time of the dissolution of the firm, the owner of a two-thirds interest in the said business, subject to debts and liabilities in favor of Knott. He claimed, also, that there had been an account stated between the parties, and a balance struck, by which there was found due to said Moore \$1,660.72, to said Knott \$6,424.30, and to himself \$5,012.44.

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Several other issues were involved in the case between the parties, which it is unnecessary to notice. The suit was referred to a referee to find the facts and conclusions of law, and upon whose report the decree appealed from was entered. The following are the findings of fact and law reported by the referee, viz.:—

“First. That on or about the 15th day of April, 1882, the plaintiff and the defendants entered into an agreement of copartnership in the saw-mill business at Albina, Oregon, for a period of ten years from March 1, 1882, under articles of copartnership as stated in the plaintiff's complaint, herein. *Second.* That prior to the formation of said partnership, the plaintiff, together with others, was owner of certain mill machinery then situate in Columbia County, Oregon. *Third.* That under and by the terms of said copartnership agreement, the said plaintiff removed said machinery from said Columbia County to the mill of said parties at Albina, Oregon, and performed work and labor in placing the same in said mill, all of which was of the value of about \$6,100. *Fourth.* That said partnership business was unsuccessful, and on or about the 13th day of March, 1883, it was mutually agreed by and between all of said partners to discontinue said business, and sell out all of said partnership property, if a purchaser could be found at a price which would repay to said Levi Knott his advances made to said firm, with interest thereon, and repay to said plaintiff • the cost of the machinery placed by him in said mill, together with the work done by him in so constructing and placing the same. *Fifth.* That on or about said date an offer of \$16,000 was made for said mill property by J. S. Cochran, and it was thereupon mutually agreed, by and between said partners, to accept said offer, and sell said property at said price, and apply the proceeds in the manner so agreed upon. *Sixth.* That in consideration of said agreement, the said copartners did, upon the — day of March, 1883, sell and convey to said Cochran the said mill property for said sum, and also, at or soon after said date, sold all lumber and wood belonging to said firm for the sum of \$1,418.25. *Seventh.* That up to the

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time of said sale the said Levi Knott had made advances of money to said firm in the amount of \$6,165, over and above all assets; and there was due and owing to him from said firm the said sum of \$6,165. *Eighth.* That at said date the said plaintiff was owing the firm a balance of \$1,103.84; and the cost of mill machinery furnished by him, and his work, was \$6,100. *Ninth.* That at the same date the said Estes was indebted to the firm in the sum of \$855.64 over and above all credits. *Tenth.* That since said sale said Knott has received of the proceeds of the same, and the sale of lumber and wood, the sum of \$16,323.67, and has paid debts of the firm amounting to \$5,964.55, leaving in his hands the sum of \$5,493.86, over and above all his expenditures and claims against said firm. *Eleventh.* That since said sale the said Anthony Moore has received of the proceeds thereof the sum of \$1,094.58, leaving the amount due him the sum of \$3,901.58. *Twelfth.* That since said sale said Estes has collected of amounts due to said firm the sum of \$361.25, and has paid of the firm debts \$1,594, leaving the amount of his debt to the firm at \$1,200.82. *Thirteenth.* That the surplus on hand after payment of the respective claims of Knott and Moore, and after payment of all debts, save and except the costs of this suit, is \$1,581.79. That as between defendants Estes and Knott there was no contract or agreement that the said Estes should have the said interest of • Knott in the copartnership, and the said Knott retained his interest in said firm as a copartner under the articles of copartnership up to the time of the dissolution thereof."

As conclusions of law:—

"That the plaintiff is entitled to a decree, decreeing that the defendant Knott pay to the plaintiff the sum of \$3,901.58, and the further amount of one half of what shall remain of said surplus of \$1,581.79 after payment of the costs of suit out of the same, and that the plaintiff and said defendant Knott each have judgment against the defendant Estes for an amount equal to the one third of what shall remain after deducting one half of said surplus (after the payment of the costs thereout) from said amount of \$1,200.82."

There is an evident error in the result found by the referee as to the amount of money in the hands of Knott at the date of his report. The amount of money Knott received was \$16,000 for the mill, and \$1,418.25 for wood and lumber. From this, Moore received \$1,094.58. Knott then had remaining the \$16,323.67 as recited in the tenth finding of fact. From this take the advances Knott had made up to the time of the sale—\$6,165—and the \$5,964.55 he had paid debts of the firm since the sale, amounting to \$12,129.55, and it does not leave in his hands \$5,493.86, but \$4,194.70. Nor do we agree with the referee in his fourth and fifth findings of fact, so far as they find that it was mutually agreed between the said partners to sell out the partnership property and repay Moore the costs of the machinery placed by him in the mill, or to apply the proceeds of such sale to such purpose.

The evidence was sufficient to authorize the referee to find that Knott was willing that Moore should have all the proceeds of the sale of the partnership property after the debts of the firm were paid, but it nowhere appears that Estes consented to any such arrangement. The fact is that Moore and Knott ignored Estes in the transaction; but they had no right to do so, in view of their stipulation in their articles of copartnership hereinbefore set out. By that clause in the articles, Estes was entitled, in case of a sale before the expiration of the ten years, to an equal division of the proceeds thereof, and he certainly could not be deprived of it unless he had relinquished that right for a valid consideration. Moore's and Knott's agreement upon the subject could not bind Estes without his express assent. The stipulation conferred upon him a property right which he alone could dispose of. Knott was not his guardian or agent for the purpose of releasing the right he had secured under the contract of copartnership. Knott was willing to give to Moore his interest in the assets of the concern; and we think he did, according to the weight of the testimony, agree that the proceeds of the sale should, after the debts were paid, be applied upon Moore's claim; but Estes was unaffected by the arrangement.

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It was claimed by Moore's counsel upon the argument that Estes had assigned his interest in the partnership to Knott. It appears that Estes did, on April 27, 1882, assign to Knott the lease of the premises from Nicolai to him, and that at the same time Knott agreed to reassign the same. The recital in the former agreement is to the effect that Estes was indebted to Knott for certain sums of money advanced, aggregating \$500, and that Knott had agreed to make other advances for Estes, and that to secure the money advanced and to be advanced the assignment was made. This transaction could only operate as a mortgage of the leasehold interest Estes had in the premises, and had no effect upon his relations as a partner in the business. On the other hand, Estes claimed that the transaction was evidence that Knott owned no share in the concern, but that he (Estes) owned a two-thirds interest thereof. This view cannot be maintained any more than the other. The articles established the respective interests of each partner, and Estes can no more avoid their effect than Moore can. Each of the parties would have been entitled to a third interest in the assets of the firm had not the agreement between Knott and Moore been made, by which Moore was to have all the assets, including not only the portion the former would have been entitled to, but that which Estes was entitled to as well. That agreement bound Knott's portion of the assets, but not Estes' portion thereof. The claim of Estes that there had been an account stated is not supported by the proof.

The decision of this court is that, from the moneys in Knott's hands—the \$4,194.70—the costs and disbursements in the case, including that which was incurred in the Circuit Court and in this court, be paid; that the remainder be added to the sum of \$2,198.42, the amount Moore owes the firm, and to the sum of \$1,200.48, which Estes owes the firm, and one third of such total amount, less said \$1,200.48, be paid to said Estes, and the other two thirds of such total amount, less the said sum of \$2,198.42, be paid to the said Moore, and that upon such payment being made the said Knott be wholly exonerated from further liability on account of said moneys in his hands as afore-

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said; that the decree of the Circuit Court be modified so as to conform to the principles of this decision.

Let a decree be entered herein in favor of the said Estes and the said Moore, respectively, and against the said Knott, for the respective amounts they are entitled to of the said moneys as herein determined, whenever the costs and disbursements are taxed, so that they can be ascertained.

[Filed May 11, 1885.]

**ALFRED HOVENDEN v. LEVI KNOTT AND WIFE
AND LEVI ESTES AND WIFE.**

12	287
26	349
7*	30
40*	229

FORECLOSURE OF MORTGAGE—CONTEST BETWEEN DEFENDANTS.—In a suit to foreclose a mortgage, the court has no authority to determine a controversy between defendants jointly liable on the note which the mortgage was given to secure, as to which of them was the principal debtor and which the surety.

MULTNOMAH COUNTY. Defendant Levi Knott appeals.
Decree ordered in accordance with opinion.

H. T. Bingham, for Appellants.

J. C. Moreland, for Respondent Hovenden.

Alfred F. Sears, Jr., for Respondents Estes.

THAYER, J.—This appeal is from a decree rendered in a suit brought by the respondent Hovenden against Levi and Mary E. Knott and Jennie E. and Levi Estes, to foreclose a mortgage upon certain real property situated in the city of Portland. The mortgage was executed by Jennie E. and Levi Estes to the said Hovenden, as collateral to a promissory note, also executed by the former to the latter party, and indorsed by the said Levi Knott. The property mortgaged was owned by Jennie E. Estes, who is the wife of said Levi Estes. Levi Knott was alleged to have had some interest in the mortgaged property, and the said Mary E. Knott, who is the wife of the said Levi Knott, seems to have been made a party to the suit in consequence of that fact alone.

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After the summons had been served upon all the defendants in the suit, the defendants Levi and Jennie E. Estes filed the following paper, which they termed an answer:—

“Now come the defendants Levi Estes and Jennie Estes, and for their separate answer herein, and for cause of relief against the defendant Levi Knott, allege: That the note and mortgage described in the complaint were executed and delivered by the defendants Levi Estes and Jennie Estes for the accommodation of the defendant Levi Knott, and these defendants never received any consideration therefor, and the same were made and given to the plaintiff at the request of said defendant Levi Knott, as aforesaid, and upon his promise that he would pay the same at maturity, of all which facts the plaintiff had full knowledge; that the said Levi Knott is possessed of sufficient funds to pay said note, and has abundant property, not exempt from execution and unencumbered, available therefor. Whereupon, these defendants pray that a decree may be entered in accordance with said facts: *First.* That said Knott. be decreed to be the principal debtor primarily liable for said debt and demand of plaintiff, and that said demand be satisfied, first, out of the property, personal and real, of the said Levi Knott. *Second.* That these defendants and the real property owned by said mortgagee be declared generally liable, and that the plaintiffs be entitled to judgment against them, and to the subjection of their property to foreclosure after the exhaustion of the remedy aforesaid against said defendant Levi Knott, in case any deficiency exists. For such other and further relief as to equity and good conscience appertains.”

Whereupon the defendant Levi Knott filed the following paper, which he termed a reply:—

“Now comes defendant Levi Knott, and, replying to the answer of Levi Estes and Jennie Estes, herein filed, denies that the note and mortgage described in said complaint were executed or delivered by the defendants Levi Estes and Jennie Estes, or either of them, for the accommodation of this defendant; denies that said Levi Estes and Jennie Estes never received any consideration for said execution thereof; denies that said note and

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mortgage were made or given to the plaintiff at the request of this defendant as in said answer aforesaid, or at all made or given at the request of this defendant; denies that said note and mortgage, or note or mortgage, were made or given upon this defendant's promise that he would pay the same or any part thereof at maturity, or at all; denies that of said facts, or any of them, said plaintiff had full or any knowledge. Said defendant, further replying to said answer, alleges that said note was indorsed by this defendant without consideration for the accommodation of said defendant Levi Estes, at his request, and upon his express promise and agreement that he would at maturity pay the same and hold this defendant harmless therefor. Wherefore, this defendant prays for a decree that said defendants Levi Estes and Jennie Estes be decreed to be the principal debtors, and primarily liable for said debt and demand of plaintiff, and that, as between said defendants and this defendant, said demand be satisfied first out of the property of said Levi Estes and Jennie Estes, and the mortgage sought to be foreclosed in the suit be decreed to be primarily liable for the payment of said debt."

Neither of the defendants attempted in any manner to defend against the suit of the plaintiff, or pretended to have any defense whatever to it. There are cases in which it is necessary to settle conflicting claims between co-defendants before a complete decree can be made upon the subject-matter of the suit. In the foreclosure of a mortgage, where there are subsequent encumbrances, it is often required to adjust their priority of equities in order to determine how the surplus fund shall be applied, as in *Ladd v. Mason*, 10 Oreg. 308; but this altercation between Estes and wife and Levi Knott was clearly extrajudicial. The Circuit Court had no more authority to undertake, in the proceeding before it, to determine their differences as to which was the principal debtor and which the surety, if they sustained any such relation, than it had to adjudicate upon any other dispute between them. It was wholly foreign to the object of the suit, and unnecessary to its determination. If the facts alleged by Estes and wife in their pseudo answer to this complaint are true, they could have pursued either of two remedies; they could have

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paid off the judgment recovered by Hovenden, and have recovered the amount from Knott by action or suit, or, after the obligation became payable, they could have maintained a suit against Knott to compel him to pay it. The latter remedy is in the nature of a bill *quia timet*, and is maintainable either before or after the creditor commences suit to enforce payment of the debt. It is sustained upon the grounds of the implied agreement upon the part of the principal debtor with his surety to pay the debt at its maturity, and when he fails to do so the latter may institute his suit, without having paid the debt, to compel the former to discharge it. (Pom. Eq. Juris. § 1417, n. 2; Story, Eq. Juris. § 849.)

Estes and wife have entirely mistaken their remedy in this case, and the court went beyond the confines of its power. It had no authority in the case before it except to decree a recovery of the amount of the debt against Levi and Jennie E. Estes and Levi Knott, a foreclosure of the mortgage, the sale of the mortgaged property, and the application of the proceeds to the payment of the said debt. And every act it did in the premises, in attempting to adjust the rights of the defendants as between themselves, was *coram non judice*. A decree should be rendered in favor of the said plaintiff, and against the said defendants Estes and wife and Levi Knott, in accordance with the principles of this decision, and the decree appealed from be modified so as to conform thereto. The two parties, Estes and wife and Levi Knott, should pay one half the disbursements incurred in the litigation between themselves, and on this appeal, which amount should include any disbursements the plaintiff may have incurred in regard thereto.

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[Filed May 13, 1885.]

D. E. BUDD v. MULTNOMAH STREET RY. CO.,
E. J. JEFFREY, AND W. A. SCOGGIN.

19	271
15	413
19	147
7*	99
15*	659
23*	885

TROVER—CONVERSION OF SHARES OF STOCK.—Trover will lie for the conversion of shares of the capital stock of a corporation.

CONVERSION—WHAT IS.—Any interference subversive of the right of the owner of personal property to enjoy and control it is a conversion.

MULTNOMAH COUNTY. Plaintiff appeals. Reversed.

H. T. Bingham, and J. C. Bower, for Appellant.

Stock in a private corporation is personal property. (Misc. Laws, ch. 7, § 13.) Trover is maintainable for a share of stock. (*Payne v. Elliott*, 54 Cal. 339; *Jarvis v. Rogers*, 15 Mass. 389; *Anderson v. Nichols*, 28 N. Y. 600; *Lowell Transfer of Stock*, § 231; *Ayres v. French*, 41 Conn. 149.) Trover does not lie for shares of the capital stock of a corporation, although such action may be maintained for certificates of shares. (*Burrall v. Bushwick R. R. Co.* 75 N. Y. 216, 217. See also *Denton v. Livingston*, 9 Johns. 96–100, and *People ex rel. Jefferson v. Smith*, 88 N. Y. 582; *Neiler v. Kelley*, 69 Pa. St. 407.) The complaint does not allege possession nor right to immediate possession in plaintiff, at the time of the alleged conversion or any other time, and is therefore defective. (*Whellar v. Train*, 3 Pick. 267; cited and approved in *Sharp v. Whittenhall*, 3 Hill, 576; *Fairbanks v. Phelps*, 22 Pick. 537; *Winship v. Neale*, 10 Gray, 383.)

D. W. Welty, and J. C. Moreland, for Respondent.

LORD, J.—This is an appeal from a judgment upon demurrer. The action was in trover, for the conversion of certain shares of the capital stock of the corporation defendant. The complaint in substance alleges that the plaintiff was the owner of one hundred shares of the capital stock of said corporation defendant, of the value of \$10,500, and that the defendant wrongfully took possession of said shares, and disposed of and converted the same to their own use. The demurrer to the complaint was

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sustained, upon the ground that trover would not lie for the conversion of shares of stock. The only question, therefore, presented by this record is: "Are shares of stock such personal property as an action for conversion will lie for their appropriation? What is stock, or a share of stock?" "A share in a corporation is a right to participate in the profits, or in the final distribution of the corporate property *pro rata*." (*Feld v. Pierce*, 102 Mass. 261.) "A share or interest in the capital stock of a bank or other corporation may be defined as the right to *pro rata* periodical dividends of all profits, and if the corporation is not immortal, a right to a *pro rata* distribution of all its effects on its death." (*People v. Commissioners etc.* 40 Barb. 353.) "Shares of stock are generally considered to be personal property" (Bouv. Law. Dict. "Stock"), and by our statute are to be deemed personal property, and subject to attachment, execution, levy, and sale as such. (Misc. Laws, ch. 7, § 13.) They are not "chattels personal, susceptible of possession, actual or constructive" (*Arnold v. Ruggles*, 1 R. I. 166); "but they are," says Shaw, C. J., "if not choses in action, in the nature of choses in action; and what is more important, they are personal property." (*Hutchins v. State Bank*, 12 Met. 421.) Of the nature of shares, and the right or interest in them, considered as such, Durfee, C. J., said:

"Does the term 'share' denote a thing in possession, or does it denote the mere right to a thing not in possession, but in action, and therefore subject to be claimed or demanded? We have shown that a right to a vote as a member of the corporation, and a right to the dividends of the profits of the concern, make all the beneficial interest that is called a share. But these rights subsist only in law or in contract. The individual invested with them has them *in presenti*, and in virtue thereof claims things that are not at any time all present, uniting possession with right; for all votes save one, and all dividends save one, must always exist *in futuro*—a chose not in possession—a thing subject to be demanded—money payable at a future day. A share, then, is a mere ideal thing; it is no portion of matter; it is not susceptible of tangible and visible possession, actual or constructive. Yet, in com-

mon parlance, we say that a man is possessed of a right, and it is a sufficiently intelligible mode of speaking; but then the meaning of the term 'possession' must be understood to be modified by the object to which it relates. If a right be an ideal thing merely, or something existing but in law or contract, the possession must be ideal, subsisting from law or contract. To be possessed of a share, therefore, is to be invested with the rights which constitute it, to pass in and succeed to the station, relation, and powers of the former shareholder, and to become a corporation in reference to the particular share. But it is quite evident that this cannot be accomplished but by actual transfer, or by operation of law. This, this only, can give (in common parlance) the possession of a mere right, or those rights denominated a share in a corporation."

Whenever, therefore, these things are done or happen, whether by means of contracts or by operation of law, by which an individual is invested with those rights which constitute a share in the stock of a corporation, he is, so to speak, possessed of such share—the owner of it. It is not the certificate which confers the right to or ownership of the share, nor is the certificate the stock itself, but only the paper evidence of the right or title to the share which may be used for the purpose of symbolical delivery, as the share itself, being intangible, is not susceptible of actual delivery. As thus evidenced, the certificate is the written expression of the legal existence of such share, giving to that which is intangible a tangible representative by which, as a convenient method, it may be sold, transferred, or speculated in as other personal property. A share, then, exists in legal contemplation, and is personal property, which may be dealt with, enjoyed, and subjected to judicial process as such, and of which the certificate is not the property itself, but only documentary evidence of title to it. Being thus impressed by law with the attributes of personal property recognized as such, capable of being enjoyed, dealt with, and subjected to judicial process, it would seem to follow that whenever there has been some repudiation by the defendant of the owner's right to the share, or some exercise of dominion or control over it inconsis-

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ent with such right, he is guilty of a conversion, and ought to be held liable in trover. A conversion is defined to be "a wrong, consisting in dealing with the property of another, as if it were one's own, without right." (Abb. Law Dict. "Conversion.") Judge Cooley defines it to be: "Any distinct act of dominion, wrongfully exerted over one's property in denial of his right, or inconsistent with it, is conversion." (Cooley Torts, 448.) Mr. Bigelow says: "It may be laid down as a general principle that the assertion of title to or an act of dominion over personal property inconsistent with the right of the owner is a conversion." (Big. Lead. Cas. 428.) Nor is it necessary to show a manual taking of the thing in question, nor that the defendant has applied it to his own use. "Does he exercise a dominion over it in exclusion or in defiance of the plaintiff's rights? If he does, that is in law a conversion, be it for his own or another's use." (Bac. Abr. "Trover.") The wrong lies in the interference with the owner's right to do as he will with his own. Whoever does this in any manner subversive of the owner's right to enjoy or control what is his own, is guilty of a conversion. (*Ramsby v. Beezley*, 11 Oreg. 51.) But the defendant contends that a share of stock, being intangible, is incapable of being taken and wrongfully converted to the use of another; and as a consequence, that the allegation that the defendants wrongfully took, disposed of, and converted the said shares to their own use is the statement of an impossible fact, and tenders no issue. In support of this position, *Sewall v. Bank of Lancaster*, 17 Serg. & R. 285, and *Neiler v. Kelley*, 69 Pa. St. 407, are cited and relied upon. In the latter of these cases, Sharswood, J., said:—

"A share of stock is an incorporeal, intangible thing. It is a right to a certain proportion of the capital stock of the corporation, never realized except upon the dissolution and winding up of the corporation, with the right to receive, in the meantime, such profit as may be made and declared in the shape of dividends. Trover can no more be maintained for a share in the capital stock of a corporation than it can for the interest of a partner in a commercial firm."

As based upon the common-law fiction of property lost and found, in actions of trover, which prevails in that State, and which lay only for tangible property capable of being identified and taken into actual possession, the correctness of the decision is not questioned. "But," as was said by Parke, C. J., "what matters it whether the thing itself is capable of being taken into hand and carried away, so long as it is personal property of as substantial value as any other; and in no case can the thing itself be recovered in this form of action, but only its value. There was force in the claim originally, when trover was confined to property lost. From the nature of the action it could not then lie unless the property was tangible. The fiction of lost property is still retained in declarations of this kind, but the allegation has long since ceased to be substantial, and there is no longer any reason for requiring that the property should be tangible. . . . If a certificate of stock is unlawfully retained when demanded, what is presumed to have been converted? The certificate has no intrinsic value disconnected from the stock it represents. No one would say that the paper alone had been converted, that the conversion of the paper constituted the entire wrong. The real act done in such cases is precisely the same as done here, no more, no less; and to say that trover will lie in one case and not in the other, is to make a distinction where in reality there is no difference. Conversion is the gist of the action of trover. Everywhere it is so held. The stock in both cases was converted; and we think in these days, when the tendency of courts is to do away with technicalities not based upon reason, a technical distinction of this character should no longer be sustained."

In *Payne v. Elliott*, 54 Cal. 339, in an able opinion by McKee, J., it was held, in an action for the conversion of shares of stock of a corporation, that "it is the shares of stock" which constitute the property, and not the certificate; and that an action is maintainable for the conversion of the share of stock which the certificate represents, as well as that of the certificate.

In *McAllister v. Kuhn*, 96 U. S. 87, the identical objection was made which is raised here. There the judgment had been

Points decided

taken by default, and confessed whatever had been properly pleaded, as the demurrer here admits. In that case Waite, C. J., said:—

“If the statements contained in the petition are true, and McAllister had actually converted the stock to his own use, Kuhn was entitled to damages. By his default, whatever had been properly pleaded was confessed. Had issue been joined upon the averment of conversion, it would have been necessary to show the existence of facts which in law constituted a conversion; but for the purposes of pleading, the ultimate fact to be proved need only be stated. The circumstances which tend to prove the ultimate fact can be used for the purposes of evidence, but they have no place in the pleadings. We think the complaint does state all the facts necessary to constitute a cause of action.”

Under our system, the technical difficulty which embarrassed the common-law action for trover, and made it only applicable for the conversion of tangible property, no longer exists, and the action may be maintained for the conversion of every species of personal property. We think the complaint states the necessary facts to constitute a cause of action. The demurrer is not well taken, and the judgment must be reversed.

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[Filed May 19, 1885.]

HENRY WEINER v. LEE SHING ET AL.

COMPLAINT—CAUSE OF ACTION.—A complaint which alleges that defendants employed G. and B. to perform services, for which they promised to pay said G. and B. \$1,000; that G. and B. for a valuable consideration assigned said claim to the plaintiff, does not state a cause of action, in failing to allege that such services were performed.

DEFECTIVE PLEADING—WHEN AIDED BY VERDICT.—The verdict does not supply any fact omitted from a pleading, but it establishes every reasonable inference that can be drawn therefrom.

MULTNOMAH COUNTY. Defendants appeal. Reversed.

W. H. Adams, for Appellants.

It is necessary to allege either performance or a promise to perform in a complaint on a contract for services. (*Russell v. Slade*, 12 Conn. 455; *Lent v. Padelford*, 10 Mass. 230; *Warren v. Bean*, 6 Wis. 120.) The failure to so state is a material defect, and is not cured by verdict. (*Mack v. City of Salem*, 6 Oreg. 275; *Chichester v. Vass*, 1 Call, 83; S. C. 1 Am. Dec. 509; *Lee v. Emery*, 10 Minn. 187; *Trimble v. Doty*, 16 Ohio St. 118, 128.)

W. Scott Beebe, and *G. W. Yocum*, for Respondent.

Even admitting that the statement of the cause of action in the complaint is defective, it is cured by the verdict. (*Bowen v. Emmerson*, 3 Oreg. 452.)

THAYER, J.—This appeal is from a judgment for the plaintiff, rendered in an action to recover money. The action was tried by a jury, and resulted in a verdict for the respondent for the sum of \$1,000, the amount claimed to be due. Among the questions raised upon the appeal is that the complaint does not state facts sufficient to constitute a cause of action. The following is the substance of the complaint:—

“That Lee Shing and Lee Shing Tin are, and during all the times herein mentioned were partners, doing business at Portland, Oregon, under the style and firm name of ‘Quon Wo On,’ and that during the year 1883 said above-named defendants and Ah Foo employed Gaston & Beebe to perform services, for which they promised and agreed to pay said Gaston & Beebe the sum of \$1,000 on or before May 1, 1884; that on May 16, 1884, said Gaston & Beebe, for a valuable consideration, assigned said claim to plaintiff, who now owns the same, and upon which there is now due and owing the sum of \$1,000. Plaintiff therefore asks judgment against defendants for \$1,000, and costs and disbursements.”

The respondent's counsel claims that if the complaint would have been held insufficient upon demurrer, by reason of any defect apparent upon its face, such defect has been cured by verdict. The rule is no doubt correct, that where the statement of the plaintiff's cause of action, and that only, is defective or

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inaccurate, the defect is cured by a general verdict in his favor. But where no cause of action is stated, the omission is not cured by verdict. (Gould Plead. 463, § 13.) The reason of the rule as stated in the section is there explained by the following quotation from a decision made by Lord Mansfield:—

“To entitle him [the plaintiff] to recover, all circumstances necessary in form or substance to complete the title so imperfectly stated must be proved at the trial; and it is, therefore, a fair presumption that they were proved.”

It is not always an easy matter to determine whether such defect is in the statement of the title or cause of action, or a defect in the title or cause of action. The verdict does not supply any fact omitted from the complaint, but it establishes every reasonable inference that can be drawn therefrom. If the complaint is defective in not containing some material allegation, the defect will not be cured by verdict. In this case, the gist of the action was a promise to pay the \$1,000, but that promise, standing alone, was *nudum pactum*. No right of action in such case arises in favor of the promisee in consequence of its breach. The facts showing that the promise was binding had to be alleged. The plaintiff, in such a case, must show by his complaint, not only that the defendant made a promise that he had broken, but also that the promise was made upon sufficient consideration; and unless the allegation in this complaint, that the defendant employed Gaston & Beebe to perform services, directly or by necessary implication avers a sufficient consideration for the promise to pay the \$1,000, the cause of action was defective.

The said allegation is the statement of an executory consideration. The employment of Gaston & Beebe was to “perform services.” It was something to be done by those parties. No other construction can be placed upon the words employed. In declaring upon such a promise it is always necessary to state the particular consideration upon which it was founded, and it is essential that the consideration stated should be legally sufficient. (1 Chitty Plead. 293.) The learned author also says (pp. 295, 296) that in the statement of an executory consideration a greater degree of certainty is required than in that of an

executed consideration. "The consideration and the promise of the defendant are two distinct things. In order to show that the plaintiff possesses a right of action, it is, in general, necessary to aver performance of the consideration on his part, which allegation, being material and traversable, must be made with proper certainty of time and place. This obligation of averring performance imposes upon the plaintiff the necessity of stating the consideration with a greater degree of certainty and minuteness than in the case of executed considerations; for the court would otherwise be unable to judge whether the performance averred in the declaration were sufficient." These requirements are certainly very reasonable. A naked promise to pay a sum of money, unless in a promissory note or in an instrument under seal, imports no consideration. The first inquiry of the mind is, where such promise is alleged to have been made, what was it for? The plaintiff who seeks to enforce the promise must answer that inquiry satisfactorily. He must show that it was made upon a consideration legally sufficient, and if an executory consideration, that he has performed it, or legally obligated himself to perform it, and been ready and willing to carry out his undertaking in that behalf; if an executed consideration, that it was performed by the promisee at the request of the promisor.

These rules of pleading have been maintained by able courts for centuries; they are the soul of reason, and should be enforced between all classes of persons involved in litigation, of whatever complexion. It is hardly necessary to say that the respondent's complaint wholly fails to conform to the rules referred to. It fails to disclose what the employment was. The court could not know from it whether the employment was to do a lawful or an unlawful thing, and there is no pretense in the complaint that the parties performed it, whatever it was. The respondent may as well have counted upon the breach of a bare promise to pay the money as upon the meager facts alleged. All that can be claimed to be alleged is an employment to do services. The complaint would have been improved by a statement showing what Messrs. Gaston & Beebe were employed to do, but it

Argument for Appellant.

would then have been totally defective without a further statement showing that they had performed it, or, as before mentioned, had legally obligated themselves to perform it. It is error to render a judgment upon a defective complaint. The judgment of the court is a conclusion of law from the facts contained in the whole record, and if that discloses a complaint radically defective, the plaintiff is not entitled to any judgment. (Gould Plead. p. 459, § 3.)

Upon the view we have taken, the judgment appealed from is not supported by the complaint in the action, and must therefore be reversed. The case will be remanded, and the defendant may apply to the court below for leave to amend his complaint.

[Filed May 19, 1885.]

JACOBSEN v. SIDDAL.

CRIMINAL CONVERSATION—EVIDENCE OF THE MARRIAGE.—In an action of criminal conversation the marriage may be proved by the testimony of eye-witnesses or the parties themselves. The certificate of the marriage is not essential.

EVIDENCE—NONSUIT.—Where incompetent evidence is admitted without objection in the course of a trial, the court will treat it as competent on motion for nonsuit.

LD.—GIST OF ACTION—EFFECT ON RELATION OF PARTIES.—The gist of the action is not alone loss of service but of the society and comfort of the wife; the plaintiff had a right to show the terms upon which he and his wife lived together, and the practical consequences to their married life from the injury alleged.

WASCO COUNTY. Plaintiff appeals. Reversed.

The facts appear in the opinion.

J. H. Bird, for Appellant.

In a case of this character any evidence of the marriage is competent, the effect whereof is not derived from the presumed innocence of a cohabitation reputed matrimonial. (1 Bish. M. & D. 8th ed. §§ 482-487, *et seq.*; *The State v. Winkley*, 14 N. H. 480.) In this case the marriage was proved by the persons who were present at its solemnization. Such testimony is

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not only competent, but it is the very best that the nature of the case admits of. (1 Bish. M. & D. § 494; *State v. Kean*, 10 N. H. 347; S. C. 34 Am. Dec. 162; *Com. v. Norcross*, 9 Mass. 492; *Com. v. Littlejohn*, 15 Mass. 163; *Hutchins v. Kimmell*, 31 Mich. 126.) When the celebration is testified to by the persons who were present at it, the law presumes that everything necessary to uphold the marriage has been regular and according to law. (*Hutchins v. Kimmell*, *supra*; *State v. Kean*, *supra*; *Hayes v. The People*, 25 N. Y. 390; Whart. Crim. Ev. §§ 827, 828, n., 835.) It is immaterial whether the act complained of was done with or against the consent of the wife. (2 Hill. Torts, 506, § 17; *Egbert v. Greenwalt*, 44 Mich. 245; *Forsythe v. State*, 6 Ohio, 23.) The primary and essential injury to the husband is the corrupting of the body of the wife, and for this alone he is entitled to substantial damages. (*Bigaouette v. Paulet*, 134 Mass. 123.) It was error not to allow the witnesses to testify what effect the criminal acts of the defendant produced on her body and mind. (See *Knight v. Wilcox*, 18 Barb. 212; *Abrahams v. Kidney*, 104 Mass. 222; *Blagge v. Iseley*, 127 Mass. 191.)

W. Lair Hill, and *F. P. Mays*, for Respondent.

The basis of the plaintiff's right to recover, if at all, arises from his relation to Martha Jacobsen, and that relation must be proved by direct evidence. (Cooley Torts, pp. 226, 227, and cases there cited; *State v. Hodgskins*, 19 Me. 155; S. C. 36 Am. Dec. 742; 2 Greenl. Ev. § 461; 2 Hill. Torts. § 1, p. 508.) The gist of this action is in the loss to the husband of some kind of services of the wife. (Cooley Torts, pp. 226, 227, and cases there cited; 2 Sedgwick Damages, p. 545, n.; *Joch v. Dankwardt*, 85 Ill. 331.)

LORD, J. — This action was brought by the plaintiff to recover damages for alleged criminal conversation with his wife. Upon issue being joined the trial proceeded, and the plaintiff gave and offered the evidence set forth in the bill of exceptions, when the defendant moved the court for a nonsuit upon the grounds, (1)

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that plaintiff had failed to prove the alleged marriage; (2) that he had failed to prove any damages sustained by him, or any facts from which a jury would be authorized to find damages for the plaintiff; and (3) that he had failed to prove a cause sufficient to be submitted to a jury. The court below granted the motion, and judgment was entered in favor of the defendant for costs, from which this appeal has been taken.

The basis of the plaintiff's right to recover arises out of the alleged relation of husband and wife, and the fact of marriage must be proved by direct evidence. By the bill of exceptions it appears that after the plaintiff and his wife had testified directly to the fact of marriage, a certificate of the same was offered in evidence, to which several objections were made and sustained. Whether the objections were well taken or not is immaterial, as the plaintiff was competent to testify to the marriage. The contract of marriage, or its solemnization before a minister or magistrate, may be proved by the testimony of an eye-witness, and for this purpose a party is competent. In *Bissell v. Bissell*, 55 Barb. 329, the court say:—

“In cases affecting the legitimacy of issue, right of succession to property, and many other cases, such a contract may be proved by circumstantial evidence, by admission of the parties, by living together as man and wife, etc. But there is another class of cases, such as prosecutions for bigamy, *crim. con.*, etc., in which there must be direct evidence of the actual marriage. By actual marriage is meant, not the solemnization before a minister or magistrate, for, as has already been shown, no such solemnization is requisite, but what is intended is that the actual making of the marriage contract between the parties must be proved by direct evidence, and not left to be inferred from circumstances, and admissions, and the like. Until, by recent legislation, the wife was made a competent witness in actions in which her husband is a party, it is evident that when a marriage of this description was contracted in the absence of witnesses, there was no means of furnishing the direct proof required in this class of cases, and offenses of this description might be committed with comparative impunity. But now, the wife being made a com-

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petent witness, her testimony, if corroborated and entitled to credit, is sufficient to establish the marriage.

The certificate, properly authenticated, or the record of the marriage, is not essential to the establishment of the relation of marriage, but the party may prove the fact of marriage. The record shows that both the husband and wife, in substance, testified that they were such, that they were married about eight years ago in Iowa, and that ever since they had lived together as husband and wife; and that this testimony was received without objection. In *Kilburn v. Mullen*, 22 Iowa, 503, the court held that record evidence is not indispensable to prove a marriage, but that the fact may be established by witnesses having knowledge thereof. This was an action for criminal conversation, and the court, by Dillon, J., followed the rule laid down in *State v. Wilson*, 22 Iowa, 364, in which he said:—

“We are aware of the state of the authorities touching this question, but do not deem it necessary to enter at large upon its discussion. We have heretofore made a similar ruling in relation to bigamy, where the rule should be at least as stringent as in a prosecution for adultery.” (*State v. Williams*, 20 Iowa, 98.)

“Where direct evidence of the marriage is required,” said Perly, C. J., “other evidence besides the register may be made by the testimony of witnesses present at the marriage, or of the parties themselves, when competent.” (*State v. Marvin*, 35 N. H. 22. See also *Com. v. Norcross*, 9 Mass. 492; *Com. v. Littlejohn*, 15 Mass. 163.) Our statute has very materially invaded the common-law rule, and, subject to the restrictions enumerated, the husband or wife is a competent witness. (Code, §§ 700, 702; Abb. Tr. Ev. 684.) Subject to these limitations, and for the attainment of truth, it is not perceived why all persons having knowledge of the facts, and especially those ordinarily most conversant with them, the parties themselves, should not be permitted to testify. Besides, it seems if the testimony was incompetent, but was admitted without objection, the court will treat the testimony as competent on motion for nonsuit. (*Janson v. Brooks*, 29 Cal. 214.)

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The next objection is that the court erred in excluding testimony offered to show the terms on which the plaintiff and his wife lived together, and the effect the criminal act produced on her body and mind. The substance of the allegation in the complaint is that the carnal intercourse was effected by forcible ravishment. The defendant contends that the gist of the action is loss of service. In a note to Chitty Pleading, margin, pages 642, note *b*, and 856, note *a*, it is said the wrong complained of is not immediate, but consequential; the gist of the action not being the supposed assault on the wife, but the consequent corruption of the body and mind of the wife. In *Weedon v. Timbrell*, 5 Term Rep. 360, Lord Kenyon said:—

“It is material to consider what is the gist of the action. The plaintiff contends it is the criminal act; but that I deny. I think it is a civil action, brought to recover satisfaction for a civil injury done to the husband, and not to punish the defendant for having broken the laws of morality and decency.”

And it was held that the gist of the action was the loss of the society and comfort of the wife. It is the loss of consortship which is the gist of the action. “The plaintiff,” said Allen, J., “cannot maintain this action for an injury to the wife only; he must prove that some right of his own, in the person or conduct of his wife, has been violated. . . . His interest is expressed by the word ‘*consortium*’—the right to the conjugal fellowship of the wife; to her company, co-operation, and aid in every conjugal relation. . . . The essential injury to the husband consists in the defilement of the marriage bed, in the invasion of his exclusive right to marital intercourse with his wife, and to beget his own children. This presumes the loss of the *consortium* with his wife; of comfort in her society, in that respect, in which his right is peculiar and exclusive.” (*Bigaouette v. Paulet*, 134 Mass. 123; *Fry v. Dersler*, 2 Yeates, 278; *Wood v. Mathews*, 47 Iowa, 410; Abb. Tr. Ev. 685; 1 Chitty Plead. margin, 134, 167.) Nor are the rights of the plaintiff affected in such cases, whether the act was done by the consent of the wife, or was accomplished forcibly and against her will, except in aggravation or mitigation of the injury. “The common law, in giv-

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ing this remedy, instead of making the husband's right of action depend on his wife having consented to her defilement, has invariably, whatever the truth might be, decisively assumed that she did not assent, but was overcome by force, and the action has been sustained just the same, whether, as a matter of fact, her will consented or she was outraged by actual violence." (Bac. Abr. "Marriage and Divorce," 551, 553; 3 Blackst. Com. 139; 1 Chitty Plead. 16th Am. ed. 140, 141, 150, 151, 188; 2 Hill. Torts, 507; *Forsythe v. State*, 6 Ohio, 23.) And there seems to be no basis in justice or policy for the position that, if the personal wrong is accompanied by circumstances of such atrocity as to elevate it to the public offense of rape, the private remedy is either taken away or suspended. (Cooley Torts, 86, 90; Graves, J., in *Egbert v. Greenwalt*, 44 Mich. 246.) The injury done the husband consists in the dishonor of his marriage bed, the loss of his wife's affection, and the comfort of her society, as well as any pecuniary injury for loss of services. The actual injury, and the extent of it, very greatly depends on their prior relations, and the consequences, as between them, resulting from her defilement or defection. The plaintiff had a right to show the terms upon which he and his wife had lived together, and the practical consequences resulting to their married life from the injury alleged. Upon the question of damages the relation of the plaintiff to his wife, the circumstances of their domestic life, etc., may be shown. (Cooley Torts, 224, 225; Hill. Torts, p. 509, § 21.) But this the counsel for the defendant concedes, and admits the error assigned to be well taken, if the gist of the action is not specifically for loss of services, and the pecuniary injury confined to it. But as the law is otherwise, the judgment must be reversed, and a new trial ordered.

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[Filed May 19, 1885.]

JOSEPH · KONIGSBERGER v. N. HARVEY ET AL.

ASSAULT AND BATTERY—JUSTIFICATION—PLEADING.—In an action for assault and battery, justification, to be available as a defense, must be specially pleaded.

CLACKAMAS COUNTY. Plaintiff appeals. Reversed and new trial ordered, with leave to defendant to file amended answer.

F. V. Drake, for Appellant.

F. O. McCown, for Respondent.

THAYER, J. — This appeal is from a judgment of the Circuit Court for the county of Clackamas. The appellant commenced an action in that court against the respondent and N. Darling, to recover damages for an assault and battery alleged to have been committed upon him by said defendants. The defendant Darling was not served with summons and made no appearance. The complaint was in the ordinary form, and alleged both general and special damages. The respondent filed an answer to the complaint, in which he made the following denials, and in the following form :—

“ Denies that this defendant, with force or arms, or otherwise, violently or otherwise, assaulted or struck or beat or bruised or wounded the plaintiff about the head or shoulders or back, or elsewhere, with his clenched fists, or with a heavy iron shovel, or otherwise, or until he became insensible, without cause or provocation, or with intent to injure, hurt, or damage the plaintiff.”

The remaining denials were to the injury and damages alleged in the complaint. The answer contained no other defense. The action was tried by jury, and the bill of exceptions shows that evidence was given on the part of the plaintiff tending to prove that the respondent assaulted and beat him, and the extent of the injury and damages suffered in consequence thereof. Upon the part of the respondent, it was testified that the appellant made the first assault. After the evidence closed, and the court

had instructed the jury generally as to the law in the case, the appellant's counsel asked that the following instruction be given, viz:—

“The jury are instructed that the defendant Harvey has not pleaded any facts in justification of injuries to plaintiff. If you find, therefore, that defendant Harvey did injure the plaintiff, you must find a verdict for the plaintiff against defendant Harvey, in such sum as Konigsberger is shown to have suffered by such injury.”

This instruction and another covering the same grounds, but more direct and certain, which the appellant's counsel requested to be given, were refused by the court, and an exception allowed to the ruling. The jury returned a verdict for the respondent. The judgment against the appellant was entered, from which the appeal is brought, and the refusal to charge as requested assigned as error, which raises the only point in the case. The answer, in legal effect, merely controverts the assault and beating without cause and provocation, or with intent to injure, hurt, and damage the plaintiff. Strictly construed, it tendered no issue to the cause of action alleged in the complaint. It admits really that the respondent beat the appellant, but denies that it was without cause or provocation, or with intent to injure, etc. The respondent's attorneys very probably supposed that by denying the wrong they would be admitted to justify the act. But parties cannot justify in that way. It does not present the facts upon which justification is claimed—does not show why the beating was not wrongful. The facts must be averred in such cases constituting the justification, and in such a manner that the court can judge that the party was not in the wrong. The party's assertion that the act was not wrongful is no fact; and that is all the denial amounts to. They doubtless fell into the error in consequence of a misapprehension of the effect of the adoption of the Civil Code. It is too often regarded as an original system of practice and pleadings, when in fact it is more a change of the form of an existing system.

The case at bar may serve as an illustration. The appellant alleges that the respondent assaulted and beat him; the respond-

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ent claims that what he did was in attempting to repel an assault made by the appellant. He is not able, truthfully, to deny that he did beat and strike the appellant, but claims to be able to prove that the appellant made the first assault, and that he only acted in self-defense. The law upon that subject is the same as it was 500 years ago. The right of self-defense is a natural right, inherent in mankind, though the mode of presenting the defense has been changed somewhat. Under the practice that formerly prevailed, it would have been presented by a plea of *son assault demesne*, in which the facts would have been stated with much formality and great precision. The Code has dispensed with a good deal of the formality, but requires the facts which constitute the defense to be set forth in the form of an answer, under the head of new matter. It is new, because it is not embraced in the statement of facts made by the appellant in his complaint. (Pom. Rem. § 691.) The reason why the facts constituting such a defense are required to be set forth in some form is the same now as it was when pleadings were first devised. It is in order to apprise the opposite party of what he must be prepared to confront, so that he will not be taken by surprise.

In *Watson v. Christie*, 2 Bos. & P. 223, decided nearly a century ago, the same principle was recognized. That was a case of trespass for assaulting and beating the plaintiff. The defendant pleaded not guilty. At the trial it appeared that the defendant was the captain of a ship, and the plaintiff was one of his crew. After the proof was made of the beating, the defendant offered to show that it was given by way of punishment for misbehavior on board the ship, and it was insisted that the conduct of the defendant at the time of the assault, being necessarily in evidence, proved that misbehavior; but Lord Eldon, C. J., before whom the cause was tried, directed the jury that the only questions for their consideration were, whether the defendant was guilty of the beating, and what damages the plaintiff had sustained in consequence of it; that although the beating in question, however severe, might possibly be justified on the ground of the necessity of maintaining discipline on board the

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ship, yet that such defense could not be resorted to unless put upon the record in the shape of a special justification; that the defendant had not said on the record that this was discipline, or justified it on any ground. I cite this case on account of its analogy to the one under consideration, and because it is referred to in the late revision of Estee's Pleadings, as authority that justification has still to be specially pleaded. The decisions of courts uniformly sustain this view, and it results therefrom that the instruction requested by the appellant's counsel should have been given.

The judgment must therefore be reversed, and the case be remanded for a new trial. The respondent should have leave to file an amended answer conforming to the views here indicated.

[Filed May 19, 1885.]

CLAIBORNE NEIL v. J. C. TOLMAN, J. HOUCK,
AND P. DUNN.

AND

LEANDER NEIL AND WIFE v. SAME.

FORMER JUDGMENT—RES JUDICATA.—A former judgment is final and conclusive between the parties, not only as to the matter actually determined, but as to every other matter which the parties might have litigated and had decided as incident to, or essentially connected with, the subject-matter of the original action, either as a matter of claim or defense.

ID.—DEFAULT.—A judgment by default is attended with the same legal consequences (by way of estoppel) as if there had been a verdict for the plaintiff.

WATER RIGHTS.—A former decree for want of answer having established the defendant's right to divert the waters of Bear Creek through the ditch in controversy, that right cannot be again litigated between the same parties.

JACKSON COUNTY. Plaintiffs appeal. Affirmed except as to quantity of water the defendants are entitled to.

J. A. Neil, and George H. Williams, for Appellants.

H. K. Hanna, John Kelsey, and C. B. Bellinger, for Respondents.

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LORD, J.—These suits, being similar, were consolidated and tried together, the same evidence being applicable in both cases. They were brought to enjoin the defendant from diverting the water of Neil or Bear Creek.

The complaint in the case of Claiborne Neil alleges in effect that the plaintiff is the owner of certain land in Jackson County, which lies along Neil Creek, and embraces both banks and the channel of such creek; that the plaintiff is entitled to the use of all the water of such creek for irrigation, watering of stock, and for domestic purposes, and that during the summer months he needs all such water therefor; that he has so used the water since 1855, except when wrongfully deprived of it by the defendants; that the defendants have a ditch leading from a point on Neil Creek about one mile above plaintiff's land, along the foot of the hills and away from said stream about two miles to Clayton Creek; that by means of such ditch defendants divert the water of Neil Creek away from and around plaintiff's land, and use up and waste such water in irrigating several farms, so that it never returns to said Neil Creek; that at no time prior to 1875 did defendants use more than sixty inches of water through such ditch, but that since that date defendants have diverted more than that quantity, and that during the last three years they have diverted all the water during the summer months except about fifteen inches, and have diverted during said three years more than one hundred and fifty inches, under a six-inch pressure, and are now diverting nearly all of the water of said creek, and plaintiff has now no water for irrigating, and his crops and orchards are suffering from the want thereof; that defendants threaten to continue such diversion, etc.; that plaintiff has always objected to and protested against such diversion; yet the defendants have by force and threats persisted therein.

The complaint in the second case—that of Leander Neil and wife—is, in effect, the same as that in the case of C. Neil.

The answer in the case of C. Neil denies plaintiff's allegations as to his right to the use of all the water of Neil Creek, and denies his right to use, or that he needs any of such water,

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except so much as remains in said creek after the defendants have taken therefrom so much as they are entitled to, which amount is stated in a subsequent part of the answer; denies the continuous use alleged by plaintiff. The answer denies all the other allegations of the complaint, except that as to the ownership by plaintiff of the land described, with certain qualifications which appear in the affirmative allegations of the answer.

The answer alleges, affirmatively, that in the year 1852 the ditch mentioned in the complaint was constructed by the defendants and their grantors for irrigation and other purposes, and that they and their grantors have had the continuous and uninterrupted use and enjoyment of the water so taken by them adversely to plaintiff, and all other persons, too, and until they were enjoined by this court in 1883, and that they have had the use of said ditch for more than thirty years last before the commencement of this suit, and that they diverted a part of said stream and not the whole of it. The answer further alleges that defendants diverted by their said ditch not less than one hundred and sixty inches of water by its natural flow, and under no other pressure than a fall of three fourths of an inch to the rod. That since the year 1867 they have diverted water in said ditch from said creek as follows: From January 1st to August 15th, one hundred and sixty inches; from August 15th to September 20th, one hundred inches; and from September 20th to January 1st, sixty inches, and no more, by its natural flow through a ditch having a fall of three fourths of an inch to the rod, and no other pressure and no greater quantity than herein stated. The answer further sets up a former adjudication of the same matter, by decree of injunction rendered by the Circuit Court of Jackson County, Oregon, on June 16, 1873. All the material allegations in the answer are denied by the replication.

The questions raised and contested by the pleadings in this suit are: (1) Did the defendants acquire any right as against plaintiff to divert the water by reason of prior appropriation? (2) Have they acquired any title by prescription from adverse use? (3) Was there any former adjudication which can estop

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the plaintiff in this suit? Our examination of these defenses will be in the inverse order in which they are here presented, and will extend only so far as the decision of the cases may require.

The first inquiry, then, will be: Has there been a former adjudication which estops the plaintiff? In June, 1873, the defendants began a suit in equity, in the Circuit Court of Jackson County, to restrain the plaintiff Neil from diverting the water of the ditch in question. The complaint in that case particularly described the ditch of which it is alleged they were the owners, and that said ditch and the waters thereof were necessary for the irrigation of the meadows, orchards, and grain crops of the plaintiffs, and for the use of their farms, and that the defendant at divers times had broken said ditch and diverted the water therefrom, so as to prevent the plaintiffs from the enjoyment and free use of the benefit thereof, and he threatened to continue so to do. The plaintiffs prayed that the defendant might be forever restrained from breaking or molesting the ditch, and from diverting the waters thereof. The record shows that the defendant was duly served with process, but made default, and a decree was rendered in accordance with the prayer of the complaint. That the ditch in that and this case is the same identical ditch is not disputed. In both cases the facts show that the ditch tapped and received its supply of water from Neil or Bear Creek, which was conducted by means of it to the farms of the plaintiffs, for the purposes of irrigation, and which otherwise would have flowed down the channel of the creek through the farm of the present plaintiff. This is necessarily so, from the facts as stated, and renders all discussion of the water and ditch, separately considered, as applied to the rights sought to be established and the injury prevented, as idle and unmeaning. The object of the former suit was plainly to prevent the plaintiff Neil from diverting and using the water conducted from Bear Creek by this ditch, and to protect the defendants in the use of such water thus derived for the purposes of irrigation. The object of the present suit is to prevent the defendant from diverting the waters of Bear Creek by

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means of the same ditch for the uses of irrigation, and to protect the plaintiff in the use of such water as the riparian proprietor. In either case, the right of the plaintiff to the water rested upon the same principle, and the gist of the suit then and now is to determine the right to this water.

The record discloses that the diversion of the water from Bear Creek has been for years the subject of contention and dispute. Prior to the suit instituted in 1873, the plaintiff claimed that the defendants had no right to take the water from the creek and run it in this ditch to irrigate their farms; that he was entitled to have the water of the creek flow down its channel as a riparian owner; and it was evidently in assertion of his right as such that he broke the ditch and turned the water back where he conceived it lawfully belonged. On the other hand, the defendants claimed that they had such right, and to establish it, settle the contention, and afford the plaintiff an opportunity to make whatever defense he had, the former suit was brought. The injury complained of, and to be prevented by that suit, was the deprivation of the water. The breaking of the ditch only occasioned the injury. Certainly, if the plaintiffs in that suit were not entitled to the use of the water as alleged, and if the defendant was entitled to such use as he now alleges in the present suit, such facts would have constituted a complete defense. The rule is well settled that "a party cannot relitigate matters which he might have interposed, but failed to do, in a prior action between the same parties or their privies in reference to the same subject-matter." (Wells Res. Adj. § 251, citing *Hackworth v. Zollars*, 30 Iowa, 433; *Hites v. Irvine*, 13 Ohio St. 283; *Le Guen v. Gouverneur*, 1 Johns. Cas. 436; *Gray v. Dougherty*, 25 Cal. 266.) In some of the cases the rule has been carried to the extent of declaring that "if a party fails to plead a fact he might have pleaded, or fails to prove a fact he might have proved, the law can afford him no relief." (Wells Res. Adj. § 251; *Bell v. McColloch*, 31 Ohio St. 397; *Ewing v. McNairy*, 20 Ohio St. 322; *Embury v. Conner*, 3 N. Y. 511; *Covington etc. Co. v. Sargent*, 27 Ohio St. 233; *Le Guen v. Gouverneur*, *supra*.) In other cases it is

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said that the test is to determine whether the matter which is claimed to be barred might have been litigated under the pleadings. (*Columbus & S. R. Co. v. Watson*, 26 Ind. 52; *Duncan v. Holcomb*, 26 Ind. 378; *Sheets v. Selden*, 7 Wall. 416; *Beloit v. Morgan*, 7 Wall. 619; *Henderson v. Henderson*, 3 Hare, 115.)

The finality of judgments rests upon the maxim, *interest reipublice ut sit finis litium*. "It is for the public good," says Mr. Broom, "that there be an end of litigation; and if there be any one principle of law settled beyond all question, it is this, that whensoever a cause of action, in the language of the law, *transit in rem judicatam*, and the judgment remains therein in full force and unreversed, the original cause of action is merged and gone forever." (Broom Leg. Max.) "It is not only final," says Radcliffe, J., "as to the matter actually determined, but as to every other matter which the parties might have litigated in the cause, and which they might have had decided. The reasons in favor of this extent of the rule appear to me satisfactory; they are found in the expediency and propriety of silencing the contention of parties, and of accomplishing the ends of justice by a single and speedy decision of all their rights. It is evidently proper to prescribe some period to controversies of this sort, and what period can be more fit and proper than that which affords a full and fair opportunity to examine and decide all their claims. This extent of the rule can impose no hardship. It requires no more than a reasonable degree of vigilance and attention. A different course might be dangerous and oppressive; it might tend to unsettle the determinations of law, and open a door for infinite vexation." Nor is the principle of the rule affected, that the judgment was obtained by default. "The rule," says Mr. Freeman, "that a judgment is conclusive of every fact necessary to uphold it, admits of no exception; and is equally applicable whether the final adjudication resulted from the most tedious and stubborn litigation, or from a suit in which no obstacle was possible to delay or defeat plaintiff's recovery. A judgment by default is attended with the same legal consequences as if there had been a verdict for the plaintiff. There exists no solid distinction

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between a title confessed and one tried and determined." (Freem. Judm. and note.) "So the neglect of a defendant to answer, and a decree *pro confesso*, are equivalent to an admission of the allegations of the bill as to all parties against whom such a decree passes." (6 Wait Act. and Def. 71; *Brummagin v. Ambrose*, 48 Cal. 368.) "The judgment is final and conclusive between the parties, not only as to the matter actually determined, but as to every other matter which the parties might have litigated and had decided as incident to or essentially connected with the subject-matter of the litigation, within the purview of the original action, either as a matter of claim or defense." (Miller, J., in *Jordan v. Van Epps*, 85 N. Y. 427. See also *Barrett v. Failing*, 8 Oreg. 152; *Bloomer v. Sturges*, 58 N. Y. 168; *Embury v. Conner*, 3 N. Y. 512.) Nor is it any objection that "the former suit embraced more subjects of controversy or more matter than the present; if the entire subject of the present controversy was embraced in it, it is *res judicata*. No man is to be twice vexed with the same controversy." (*Bigelow v. Winsor*, 1 Gray, 302; *Tioga R. R. v. Blossburg R. R.* 20 Wall. 137.)

The right sought to be established and determined in this suit involves, in fact, the same identical question which was presented in the former suit, only with this difference, a change of characters as parties to the suit. It follows, as the court below decided, that the former decree is a bar to this suit, in that it established the right of the defendant to divert the water from Bear Creek by means of the ditch in question. But it did not determine how much or the quantity of water the defendants were entitled to divert. This fact was recognized by the eminent counsel for the plaintiff, and he sought to show, by an able and elaborate investigation of the evidence, that the conclusion which the court below reached as to the quantity of water the defendants were entitled to divert could not be sustained upon the evidence.

The record discloses that the court below gave to this case that careful investigation which its importance to the rights involved demanded, and only reached the result now complained

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of after such deliberation. Since the argument I have re-examined the testimony with much care and attention, seeking to ascertain the true quantity of water which the defendants are entitled to divert, and I confess the result of my inquiries has not fully satisfied me that there is error in the amount adjudged by the court below. It is suggested, however, that there are some facts and circumstances which may possibly have escaped the attention of the court below, or perhaps not received that full consideration to which they are supposed to be entitled by their weight and importance. Among them are the gradual enlargement of the ditch by frequent cleaning, and the natural "wear and tear" of flowing water, the building of a flume with a certain incline, which presents less obstruction to the flow of the water than the natural surface, all of which, and together, it is claimed, have materially contributed to increase the quantity of water much beyond that formerly or originally diverted. It is not doubted but that these causes may have produced that result, if no precautions were taken to prevent it at the point of diversion. But there is some evidence that such precaution was taken; other, that it was insufficiently done; other, in effect, that it was not done at all. The measurements of the water vary very much, and some of them are taken at places and under circumstances that render them unfit tests. The witnesses are all reputable, good citizens, testifying to what they understand and believe to be a correct state of facts. In such conflict of testimony it is always not only a matter of delicacy, but of difficulty, to adjust the conflicting statements, and to determine the right of the matter. An approximation to it is all that can be reasonably expected.

Without reviewing the evidence, it is thought, therefore, in view of all the facts, and the rights and equities of the parties, the decree should be modified in the particular, viz., 120 inches instead of 160 inches, from January 1st to August 15th; but in all other respects the decree is affirmed; and it is so ordered. In the other case we think the evidence shows the right by prescription. The costs and disbursement will be equally divided between the parties.

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[Filed May 21, 1885.]

STATE OF OREGON v. ABE LAWRENCE.

GRAND JURY—CONSTITUTIONAL LAW—CONSTRUCTION OF STATUTE.—The Constitution, article 7, section 18, having provided that the grand jury shall be chosen from the jurors in attendance at the court, an act which provides that the clerk shall draw from the body of jurors a grand jury several days prior to the term of court is in conflict therewith and void.

ID.—INDICTMENT.—An indictment found by a grand jury so drawn is invalid, and a conviction thereon must be reversed.

MULTNOMAH COUNTY. Defendant appeals. Reversed.

James K. Kelly, for Appellant.

John M. Gearin, District Attorney, for Respondent.

LORD, J.—By the late act of the legislature it is provided, in substance, that the sheriff and clerk shall draw from the body of jurors a grand jury several days prior to the term of court.

The question presented is, does the act conflict with section 18 of article vii. of the Constitution, which provides that “the legislative assembly shall so provide that the most competent of the permanent citizens of the county shall be chosen for jurors, and out of the whole number in attendance at court seven shall be chosen by lot as grand jurors, five of whom must concur to find an indictment; but the legislative assembly may modify or abolish grand juries?” As the act necessarily selects the grand jury, not from the “jurors in attendance at the court,” it is admitted to be in conflict with the provision cited, unless the power vested in the legislature by the latter clause—“may modify or abolish grand juries”—gives validity to the act. What is meant by the words “may modify . . . grand juries?” In a general sense, to modify means to change or vary, to qualify or reduce; and unless there is something in the context, or special usage, the words are to be taken in their plain, ordinary, and popular sense. A power given to modify or abolish implies the existence of the subject-matter to be modified or abolished. When exercised to modify, it does not destroy identity, but effects some change or qualification in form or qualities, powers or duties, purposes or objects, of the subject-

12	297
433	596
12	297
436	801
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46	252

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matter to be modified, without touching the mode of creation. The word implies no power to create or to bring into existence, but only the power to change or vary in some particular an already created or legally existing thing. For the existence of a grand jury the Constitution has provided; it must be chosen from the whole number of jurors in attendance at the court. It is this body, as thus constituted, the legislature may modify or abolish. If the power is not put forth to abolish, it may be exercised to modify it; but this cannot include the power to create or destroy it. The fact that it may be abolished or modified proceeds from the assumption that its existence is already provided for, and furnishes the subject-matter upon which the legislative act is to operate.

It is grand juries to which the word "modify" in the section relates, and to which the power it embodies must be applied, and not to the mode of selecting grand jurors, for which the Constitution has provided; or, perhaps, to the grand-jury system, and not to the mode of selecting individual grand jurors who compose the grand jury. These or this the legislature may modify in various ways, by limiting or regulating their powers, duties, qualifications, etc. The Constitution, then, having prescribed that the grand jury shall be chosen from the jurors in attendance at the court, it would seem to be exclusive, and limit the legislative power in this regard. "Our act of assembly," said Gibson, C. J., "requires talesmen to be taken from the bystanders; and in this respect it is more explicit than the English statute, which directs them to be taken from *the persons attending at the assizes*. Yet the construction of one and the other has never been so liberal as to include any but those actually present." (*Simon v. Gratz*, 2 Pen. & W. 417.)

In *Randall v. State*, 16 Wis. 340, the court says: "It would be absurd to say that a member was in attendance upon the general assembly when it was not convened." The act of the legislature prescribing that the grand jury shall be drawn from jurors other than those in attendance at court is in conflict with the provision of the Constitution cited, and must yield to the paramount law. It is therefore void.

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The next inquiry is whether the effect of this is to entitle the defendant to have the indictment quashed, and the judgment of conviction reversed. Although this question was not argued, it was evidently assumed as a consequence of the declared invalidity of the law. The press of other business, and the necessity of an early decision of this matter on account of the public exigency, has denied us that opportunity for an investigation and consideration of this phase of the question which is desirable and necessary for a satisfactory solution. The proceeding here is direct and not collateral. The defendant was indicted by a grand jury chosen under a void law, to which he regularly excepted, and, as a consequence thereof, claims that the accusatory paper found against him by such a body of men is not an indictment, and that the judgment of conviction founded upon it cannot be sustained. In *People v. Petrea*, 92 N. Y. 135, the defendant was indicted by a grand jury selected under a void law. At the trial he filed a plea alleging the act to be unconstitutional, on the ground that it was a local act. The court declared the act to be void, but held that the objection to it was properly overruled in the court below, as it involved no constitutional right. The court say :—

“We are of the opinion that no constitutional right of the defendant was invaded by holding him to answer to the indictment. The grand jury, although not selected in pursuance of a valid law, were selected under color of law, and semblance of legal authority. The defendant, in fact, enjoyed all the protection which he would have had if the jurors had been selected and drawn pursuant to the General Statutes. Nothing could well be more unsubstantial than the alleged right asserted by the defendant, under the circumstances of the case. He was entitled to have an indictment found by a grand jury before being put on his trial. An indictment was found by a body drawn, summoned, and sworn as a grand jury before a competent court, and composed of good and lawful men. This, we think, fulfilled the constitutional guaranty. The jury which found the indictment was a *de facto* jury, selected and organized under the forms of law. The defect in its Constitution, owing

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to the invalidity of the law of 1881, affected no substantial right of the defendant. We confine our decision on this point to the case presented by the record, and hold that an indictment found by a jury of good and lawful men, selected and drawn as a grand jury under color of law, and recognized by the court, and sworn as a grand jury, is a good indictment by a grand jury, within the sense of the Constitution, although the law under which the selection was made is void."

But it is to be noted that the Constitution of New York does not, as the Constitution of Oregon, require the grand jury to be chosen from the jurors in attendance at the court, but the whole matter of selecting a grand jury is left almost entirely to the discretion of the legislature, without limitation or reservation. The court say: "The Constitution does not define the mode of selection." With us, so long as the grand-jury system is permitted to remain—not abolished—it is the constitutional right of a defendant accused of a crime to demand that the indictment shall be found by a grand jury selected only as provided in the Constitution. The difference is that here there is a want of power in the legislature to do what was proposed by the act; but there, it was not a want of power to do what was proposed by the act only to make it constitutional; it must be done by a general and not by a private or local law. It was because the act did not invade any constitutional right or privilege of the defendant in the selection of grand juries in that case, to which the result is attributable; it is because it does invade such right in this case that the decision is inapplicable.

There are, however, numerous authorities to the effect that when a grand jury is not selected as required by law, or a selection is made of such persons as are not qualified to act as grand jurors, an indictment found by them is null and void, and should be quashed, and the prisoner indicted *de novo*. (*Finley v. State*, 61 Ala. 201; *Couch v. State*, 63 Ala. 163; *Clare v. State*, 30 Md. 165; *Wilburn v. State*, 21 Ark. 201; *Whitehead v. Commonw.* 19 Gratt. 640; *McQuillen v. State*, 8 Smedes & M. 587; *State v. Williams*, 5 Port. 130; *Dutell v. State*, 4 Greene, 125; *Doyle v. State*, 17 Ohio, 222; *Fitzgerald v. State*, 4 Wis. 398.)

Argument for Respondent.

In *State v. Symonds*, 36 Me. 132, the court say:—

“These persons were sworn and charged as grand jurors, and added to the panel, and acted in finding this bill. But as their selection for this purpose was not in conformity to the laws of this State, they constituted no part of a legal grand jury. Consequently the indictment could not have been found by at least twelve lawful jurors, and is void and erroneous at common law; and in the spirit and language of an act of Parliament (11 Hen. N. C. 9), should be ‘revoked and forever holden for naught.’” (2 Hale P. C. 155; 4 Blackst. Com. 302; *Commonw. v. Smith*, 9 Mass. 107; *Low’s Case*, 4 Me. 439.)

Upon the whole, it is our judgment that the accusatory paper was not an indictment; that it proceeded from and was the act of a body of men selected as a grand jury in violation of the Constitution. It follows, therefore, that the judgment of conviction must be reversed, and the cause be remanded for such further proceedings in conformity with this opinion and the law as may be required.

[Filed June 1, 1885.]

STEPHEN SANFORD v. JAMES WHEELAN.

SPECIFIC PERFORMANCE—COVENANT AGAINST ENCUMBRANCES.—Where in a contract for the sale of real estate the vendor agrees to covenant against encumbrances, specific performance will not be decreed in his favor until all encumbrances on the property shall have been removed, or at least reduced to the amount of the balance of the purchase price.

UMATILLA COUNTY. Defendant appeals. Reversed and bill dismissed.

The facts are stated in the opinion.

John J. Balleray, for Respondent.

That a vendor of real property can maintain a suit for specific performance we think cannot be questioned. (*Pomeroy Spec. Perf.* §§ 6, 162; *Old Colony R. R. Co. v. Evans*, 6 Gray, 30;

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Schroepfel v. Hopper, 40 Barb. 430; *Robeson v. Hornbaker*, 2 Green Ch. 60; *Pomeroy Eq. Juris.* § 1405, n.) The encumbrances objected to could have been provided for in the decree itself, and if at the date of the decree the vendor is able to make a good title he is entitled to the remedy of specific performance. (*Pomeroy Spec. Perf.* §§ 339, 340, 341, 376, 377; *Church v. Mott*, 7 Paige, 77; *Winne v. Reynolds*, 6 Paige, 407; *Hepburn v. Dunlop*, 1 Wheat. 179.)

Richard Williams, for Appellant.

To entitle a vendor to specifically enforce a performance of a contract on the part of the buyer, he must be able to substantially comply with his contract. A failure to perform any material act on his part will defeat his suit, and the rule is more strictly construed against a vendor than against a purchaser. (3 Pom. Eq. Juris. § 1297.) The liens against this property fell due before the payments on the defendant's contract, and if deferred till payments under the contract became due would exceed them to the amount of over \$100. It would be inequitable to decree specific performance under such circumstances. (Fry Spec. Perf. §§ 797, 805, 810, 814.) The respondent having failed to remove the liens from the premises, the appellant had a right to rescind the contract, and was not bound to accept a conveyance and rely upon his covenant. (*Lawrence v. Taylor*, 5 Hill, 115; *Wells v. Smith*, 7 Paige, 22; *Story v. Conger*, 36 N. Y. 673; 2 Story Eq. Juris. 6th ed. § 779; *Delavan v. Duncan*, 49 N. Y. 485; *Peters v. Delaplaine*, 49 N. Y. 367; *Judson v. Wass*, 11 Johns. 525; *Burwell v. Jackson*, 9 N. Y. 535.) The only object sought by the respondent's bill is to enforce the mere payment of money. The proper remedy to accomplish this is in a court of law. (3 Parson Contract, 364; *Phyfe v. Wardell*, 2 Edw. Ch. 46; *Richmond v. The Dubuque & Sioux City R. R. Co.* 33 Iowa, 422.)

THAYER, J.—This appeal is from a decree of the Circuit Court for the county of Umatilla. The respondent commenced a suit in that court against the appellant to enforce the specific

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performance of a written contract under seal, of which the following is a copy :—

“Articles of agreement entered into this 8th day of April, A. D. 1882, between Stephen Sanford and James Wheelan: Witnesseth, that the said Stephen Sanford has sold, and doth agree, on or before the 22d day of April, A. D. 1882, to convey unto said James Wheelan, or his heirs or assigns, by a good and sufficient warranty deed of release and quit claim, free from all encumbrances, north half of lot 4, in block 1, in the town of Pendleton, Umatilla County, Oregon, upon said James Wheelan’s faithful compliance with the covenants herein contained, by him to be done and performed. And the said James Wheelan doth hereby agree to pay to the said Stephen Sanford the sum of \$3,000 in gold coin, the consideration money for said premises, in the manner following: Cash in hand upon the execution of the deed hereinbefore referred to, of the sum of \$1,500, and the balance within one year from the date hereof. The said James Wheelan further agrees to pay all taxes and assessments that may be levied or assessed upon said premises during the time he shall hold the same under this agreement, and save the said Stephen Sanford harmless therefrom; and the said Stephen Sanford agrees that the said James Wheelan, complying with the covenants herein contained, to be done and performed by him, shall, from the 22d day of April, 1882, have and hold possession of said premises to use and occupy as his own in a husbandlike manner.

“In witness whereof the parties hereto have set their hands and seals.

[SEAL.]

“S. SANFORD.

[SEAL.]

“JAMES WHEELAN.

“Executed in presence of

“FRED. PAGE TUSTIN.

“EDGAR J. SOMMERVILLE.”

It was alleged in his complaint in the suit that on the said 22d day of April, 1882, the time the said conveyance was to be made as provided in said contract, he prepared a deed of warranty, in terms conveying the said half of the said lot to the appellant,

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and that he was ready and willing to deliver the same to him, and to put him in possession of the said premises, but that the appellant refused to receive it, or go into the possession of the premises, or perform the contract, and the respondent claimed as relief a decree that the appellant be required to accept the said deed, and to pay him the said sums of money in accordance with said contract, and for general relief.

The appellant averred in his answer that the said premises were, at the time of the execution of the said contract, and on the said 22d day of April, encumbered by mortgages of large amount, one of which was in favor of H. J. Vanschuyver & Co., executed by the respondent to said H. J. Vanschuyver & Co., November 18, 1880, given to secure payment of a promissory note from the respondent to said company for the sum of \$1,540.66, with interest thereon from date, at the rate of one per cent per month until paid, and for \$50 additional as attorney's fees, in case suit were instituted to collect it; that said note bore date November 17, 1880, and was payable in eight months thereafter. Another of said mortgages was executed by the respondent to S. Rothchild, R. Alexander, and Richard Lambert, to secure the payment of three promissory notes from the former to the latter parties for the respective sums following: \$314.04, \$622.42, and \$203.99, each bearing date the 25th day of February, 1882, and payable ninety days therefrom, with interest at the rate of ten per cent per annum; and contained a provision for the payment of a reasonable attorney fee in case suit was instituted to collect it; and that both of said mortgages were, at the date of the execution of said contract, and had ever since been, wholly unsatisfied. Other issues were tendered by the answer, but it is unnecessary to notice them.

The respondent, in his reply to said matter in the answer, averred that said appellant had, at the time the contract was executed, actual and personal notice of said encumbrances; that he conferred with the mortgagees, and that they assured him that they would interpose no objection to the said sale, and that each of the encumbrances could, by the decree of the court in the suit, be discharged and paid out of the agreed purchase price, which

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the appellant should be decreed to pay for the premises. The reply contained denials of other portions of the answer, but there was no other issue upon said matter of encumbrance than above mentioned. Testimony was taken in the case tending to prove and disprove the various issues between the parties. The Circuit Court heard the proofs and allegations, and decreed that the appellant pay into court immediately the sum of \$3,000, and that execution issue therefor, and that said sum of money be applied by the clerk of the court to the satisfaction of the said mortgages in the order in which they were mentioned in the answer, and that the deed executed by the respondent and wife, a deed prepared and signed after the commencement of the suit, upon the payment into court of said \$3,000, be delivered to the appellant; which is the decree appealed from. The only question of importance to be decided by this court is whether the appellant could equitably be compelled to accept the deed above referred to, and required to pay the sum stipulated. It was suggested at the hearing before this court that the vendor of real property could not enforce the payment of the purchase price in equity; but the rule seems to be otherwise. It proceeds upon the ground of a mutuality of remedies. The vendee in such cases having a right to compel the execution and delivery of the deed, the vendor may also enforce the undertaking of the vendee, although the substantial part of his relief is the recovery of money. (Pomeroy Spec. Perf. Cont. § 6.)

The authorities on this subject are very numerous and uniform, except where the remedy has been limited by statute. The remedy of the vendor, however, like that of the vendee, depends upon the peculiar circumstances of the case. A court of equity ought not to interfere and compel the acceptance of a deed, and payment of the purchase money, where it would operate as a hardship upon the party, unless in strict conformity with his contract. In the case under consideration the appellant had agreed by the terms of the contract to purchase the half lot of land and pay for it \$3,000, \$1,500 thereof upon the execution of the deed, April 22, 1882, and the balance within one year from the date of the contract, April 8, 1882, and the respondent

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was to convey to him by a good and sufficient warranty deed of release and quit claim, free from all encumbrances, the said half lot. The covenants in the agreement were mutual and dependent; neither party could compel the other to perform until he had performed upon his part. The property was encumbered at the time, and the deed first prepared by respondent was incomplete, but the latter difficulty was remedied immediately after the suit was commenced, and the former would not probably have prevented an enforcement of the payment of the money in accordance with the terms of the contract, if the court could have so applied it as to discharge the encumbrances. But the contract only provided for the payment of \$1,500 at that time, which was entirely insufficient to pay off the first mortgage. The court decreed that the appellant pay the whole \$3,000, but it had no right to do that. There is no power known to the law that could compel it. The deferred payment of \$1,500 did not mature till April 8, 1883, nearly a year after the deed was required to be executed, and to compel the appellant to pay it at once imposed an obligation upon him he never stipulated to perform. He was to have a year in which to make that payment, without interest. The court, however, said he should pay it immediately, and this would not only be a hardship and loss, but it might be ruinous to a person of limited credit. Equity recognizes no such arbitrary authority as that. The great difficulty in the case arose out of the fact that the purchase price was inadequate to discharge the encumbrances. Had the \$1,500 to be paid in hand been applied to the discharge of the encumbrances, it would have left about \$300 still due and payable upon the first mortgage, and the second mortgage would have matured within a little more than a month thereafter; and when the second \$1,500 was to become due by the terms of the contract, it would not have been sufficient by about \$100, as the appellant's counsel figures it, to discharge both encumbrances. Courts of equity may be willing and anxious in such cases to give relief, although the literal and exact terms of the contract have not been complied with by the party who seeks their aid, but they certainly will not advance money for such party, nor impose a

severe hardship upon his adversary party. It was the duty of the respondent to have attended to that matter before he called upon the appellant to pay the money. He had covenanted to give a deed to the land, free from encumbrances, though his counsel says he was only to *covenant* against encumbrances; but in either case good faith and fair dealing required that he should have paid off the encumbrances, or have reduced them to the amount of the purchase price to be paid for the land, and obtained such an extension of time for their payment that such purchase price would have discharged them when paid, in accordance with the terms of contract, before he began his suit.

The rule in *Hinckley v. Smith*, 51 N. Y. 21, is the correct one upon that subject. But the respondent's counsel claims that the appellant was cognizant of the fact of the encumbrances when he entered into the contract. The evidence is conflicting upon that subject; but suppose it preponderates in favor of the respondent, and that he only stipulated to give a deed containing a covenant against encumbrances, that would not relieve him from the obligation to convey a pure title to the property. His agreement to make a deed containing such a covenant was in effect an agreement that the property should be disencumbered. A covenant against encumbrance is an assurance that the property, at the time of the enrolling and delivery of the deed, is then free therefrom. That character of the covenant is personal, and relates to the time of the execution of the conveyance, and is immediately broken if any encumbrance exists. The fact that the appellant knew of the existence of the mortgages may have been, as suggested by his counsel upon the argument, the reason and object of the stipulation in the agreement, that the respondent should give a deed free from all encumbrances. There is no pretense that the appellant assured the payment of the mortgages. The writing contradicts any intention of that kind. The respondent's counsel also claimed upon the argument that it did not appear that the full amount of the debts secured by the mortgages was unpaid, and that the burden of proof was on the appellant to show that it had not been paid; but it is enough to say, in answer to that position, that the allegation of the

Points decided.

answer, averring that both of said mortgages were wholly unsatisfied, is not denied in the reply. Besides, the circuit judge who heard the case finds especially, in his fourth finding of fact, "that no part of either of said notes had been paid up to this date," which was June 19, 1884. I see no possible way to help the respondent out in this case. The difficulty is that he has not done equity. It would clearly be unjust to compel the appellant to accept the deed and pay the \$3,000, in the condition in which the property was on said 22d day of April, 1882, with reference to the said encumbrances. The pretended parol understanding between the parties at the time the agreement was entered into, in the most favorable light, is very inconclusive. If there had been any understanding that the purchase price was to be applied to the discharge of the said mortgages, it ought to have been pleaded; but even then it is quite doubtful whether the court could, in view of the fact that the bargain between the parties was in writing, have attached any importance to it. Chancellor Kent once said that a contract could not rest partly in writing and partly in parol, and the experience of mankind has shown that the rule is a very good one indeed. I am of the opinion that the decree appealed from should be reversed, and the complaint dismissed.

WALDO, C. J., absent.

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14 254
15 345
7* 308
12* 385
15* 461

[Filed June 2, 1885.]

W. F. PRUDEN v. GRANT COUNTY.

COUNTY COURTS—AUDITING ACCOUNT—WRIT OF REVIEW.—The county court, in auditing an account for services, where the amount of compensation is not fixed by law, is doing "county business"; its acts are judicial, and its award must be regarded as just compensation. In such case its decision may be reviewed by writ of review.

ACTION AGAINST COUNTY.—An action cannot be maintained against a county upon such a claim. Where a county deals with a party in its corporate capacity, it may be sued the same as a natural person, but where the sovereign power of the State is exercised through a county organization, a claim for compensation arising from discharge of a duty in such a case must be adjusted in the mode pointed out by law.

Opinion of the Court—Thayer, J.

GRANT COUNTY. Defendant appeals. Reversed.

The plaintiff, a physician, upon the command of a subpoena issued by the coroner of Grant County, assisted at an inquest held upon the body of one Benj. C. Acock. He claimed for such services \$125, which was returned by the coroner as a part of the expenses of the inquest. Thereafter the county court of said county sitting for the transaction of county business allowed on said account \$48.20, and disallowed the remainder. Plaintiff brought an action against the county for the balance of the account alleging the above facts, and this appeal is from a judgment overruling a demurrer to the plaintiff's complaint.

M. D. Clifford, District Attorney, and C. W. Parrish, and Geo. H. Williams, for Appellant.

L. L. McArthur, for Respondent.

THAYER, J.—The court, upon consideration of this case, is of opinion that the decision in *Cook v. Multnomah Co.* 8 Oreg. 170, is decisive of the question involved here.* The service which the respondent was required to perform was for the public benefit, and while he is entitled, under the Constitution of the State, to just compensation therefor, yet he must acquiesce in the mode prescribed by law to obtain it. The coroner subpoenaed him as a physician and surgeon to attend the inquest, and under the law it became his duty, in the presence of the jury, to inspect the body of the deceased, and give a professional opinion as to the cause of the death. (Crim. Code, § 455.) It then became the coroner's duty to return to the county court a statement of the expense attending the inquest, which that court was required to audit and pay to the persons to whom the items thereof were due, in the same manner as ordinary claims against the county. (Crim. Code, § 463.) The court is of opinion that, in auditing an account for services in such cases, where the amount of compensation is not fixed by law, it is the duty of the county court to inquire into and ascertain the same, and that the amount so determined upon and paid must be regarded as

Opinion of the Court—Thayer, J.

just compensation for the services performed; that the county court acts judicially in such a case; that its acts constitute the transaction of county business; and that when it exercises its functions in determining the amount of the claim erroneously, or exceeds its jurisdiction to the injury of a substantial right of the claimant, its decision may be reviewed by writ of review, as provided in the Code of Civil Procedure.

The case is unlike that of *Crossen v. Wasco Co.* 10 Oreg. 111. There the amount of compensation for the services was prescribed by statute. Nor is the investment of the county court with such jurisdiction, and limiting the remedy of a claimant to its exercise in such a case, the violation of any constitutional right of trial by jury. No action can be maintained against a county, under the laws of this State, except upon a contract made by such county in its corporate character, and within the scope of its authority, or for an injury to the rights of a party arising from some act or omission of such county. (Civ. Code, § 347.) Where a claim to compensation for services has been created by the officers of a county in the discharge of a public duty enjoined by law, which is made chargeable upon the county, and the amount is not prescribed by statute, the claimant cannot maintain an action thereon against the county, but must submit to the adjustment of the county court, as before mentioned. Where a county deals with a party in its corporate capacity, and violates its obligation or duty, it may be sued the same as a natural person; but where the sovereign power of the State is exercised through a county organization—employs the latter as a means and agency for the purpose of regulating and controlling affairs which are for the benefit of the whole community—a claim to compensation, created in the discharge of a duty in such a case, must be adjusted in the mode pointed out by law. The ordinary remedy for the enforcement of a right is not necessarily reserved to such a claimant. It is optional with the legislature to give that or some other substantial remedy, and in the opinion of the court it has done the latter in the class of cases referred to. The demurrer, therefore, to the complaint should have been sustained.

Opinion of the Court—Waldo, C. J.

The judgment must consequently be reversed, and the case remanded to the court below for further proceedings, as above indicated.

WALDO, C. J., did not sit in this case.

[Filed June 3, 1885.]

L. S. KEARNEY v. WM. J. SNODGRASS AND T. F. MINOR.

AND

J. S. JONES v. WM. J. SNODGRASS AND T. F. MINOR.

MOTION FOR NEW TRIAL.—EXCEPTION.—APPEAL.—No exception can be taken to an order on a motion for a new trial, nor can such order be considered on appeal.

ERROR.—EXCEPTION.—It is not error, simply, but error legally excepted to, that constitutes ground for reversal.

ID.—PRACTICE.—An exception in general terms to an instruction which is correct in point of law cannot avail a party on appeal. The proper mode is to except to the instruction, and ask that the proper instruction be given; or when the instruction is irrelevant, to ask that it be withdrawn.

CONTRACT.—LIABILITY OF INCOMING PARTNER.—Where K. agreed to deliver cattle to F. and R. at a future time, and the latter were to give their promissory note in payment upon such delivery, and before the time of delivery S. and M. became partners with F. and R. in the agreement, and in pursuance thereof the note was executed in the name of the partnership, S. and M. thereby became liable to K., although K. at the time he took the note did not know they were such partners.

UMATILLA COUNTY. Defendant appeals. Affirmed.

The facts sufficiently appear in the opinion.

R. Williams, for Appellant.

W. Lair Hill, and *H. Y. Thompson*, for Respondents.

WALDO, C. J.—This action was brought against Foster, Reeves, Snodgrass, and Minor, as partners and principals, and R. G. Thompson as surety, on a promissory note executed by Foster in the name of the partnership, Foster, Reeves & Co., and signed by R. G. Thompson as surety. Snodgrass and

12	311
12	319
14	514
15	60
15	91
15	98
19	71
19	534
7*	309
7*	339
13*	299
13*	760
13*	781
23*	816
25*	73

12	311
23	319
24	67
24	391
7*	309
31*	709
32*	1033
35*	32

12	311
128	404
7*	309
38*	347
12	311
39	479

12	311
37	89
38	306

12	311
139	488

12	311
44	474

12	311
45	182
12	311
147	490

Opinion of the Court—Waldo, C. J.

Minor, the appellants here, denied the complaint. They also set up as a separate defense that the note was given in execution of a contract made by Foster and Reeves with the plaintiff, to which they were strangers, and they also set up what they claim to have been the actual business relations between the alleged partners, which did not extend to the transaction in question. The so-called separate defense was, doubtless, immaterial, and might have been stricken out on motion.

When the case was first before us we examined it, in effect, as if before us on a motion for a new trial. The case is, in fact, here on a bill of exceptions, on appeal, as a substitute for a writ of error. The distinction is important. In the latter case we have nothing to do with the merits of the verdict, or with the evidence as a whole, which has been set out in full in the transcript. Only so much of the testimony should be put into a bill of exceptions as is necessary to explain the exceptions taken. (*Johnston v. Jones*, 1 Black, 220.) At the same time, the record should show the relevancy of the exception to the issue. (*Hughes v. Parker*, 1 Port. 141.)

No writ of error lay at common law, or under the statute of Edw. I., to the decision on a motion for a new trial. "A new trial," says Tucker, J., in *Kinney v. Beverley*, 2 Hen. & M. 327, "is only a new invention introduced on account of the severity of the judgment of *attaint*, to avoid which it was thought best to proceed in a milder way, and so new trials were introduced." "An application for a new trial was not a matter of right. It was granted *ex gr.*, to prevent a failure of justice." Gibson, C. J., said that a writ of error founded on a mistake of the jury in deciding facts would be a novelty in our jurisprudence (*Burd v. Dansdale*, 2 Binn. 90); or, as he expressed it in *Sidwell v. Evans*, 1 Pen. & W. 383, it is not the business of the court on a bill of exceptions to judge of the quantum of proof, or to correct the errors of the jury. A "bill of exceptions," as the very expression shows, must contain exceptions. (*U.S. v. Jarvis*, 3 Wood. & M. 225.) But an exception lay only for some error of law occurring at the trial. (*Onondaga Ins. Co. v. Minard*, 2 N. Y. 98; *Walton v. U. S.* 9 Wheat. 657; *Dodd-*

Opinion of the Court:—Waldo, C. J.

ridge v. Gaines, 1 McAr. 339.) This definition has been incorporated into our civil procedure act. (Laws Oreg. 151, § 227.) A motion for a new trial was made after verdict and before judgment, and hence no *exception* lay to any ruling made on such motion. The reason arose out of the nature of a motion for a new trial itself, in which the cardinal object was not to correct the errors of the court, but of the jury. In *Hood v. Huntson*, Styles, 466, in the time of the protectorate, the first reported case in which a new trial was granted, the object was to give a second jury the opportunity to correct an error of the first. Glyn, C. J., said in that case that it was for "the people's benefit" that new trials should sometimes be had. But he seems not to have forgotten that the power might easily be exercised to their detriment. The discretion of courts has been called the law of tyrants.

Lord Kenyon said, in *Calcraft v. Gibbs*, 5 Term. Rep. 20, that an application for a new trial was a direct appeal to the laws and justice of the country, and could not be tried and disposed of on any other rule. So in *Rex v. Mawbey*, 6 Term. Rep. 638, he said:—

"I think the rule was correctly stated by the counsel for the defendants, that in granting new trials the court knew no limitations except in some excepted cases; but they will either grant or refuse a new trial as will tend to the advancement of justice."

And see Buller, J., *Wilkinson v. Payne*, 4 Term. Rep. 468; Amhurst, J., *Edmondson v. Machell*, 2 Term. Rep. 5; Lord Mansfield, *Bright v. Eynon*, 1 Burr. 393; *Hewitt v. Jones*, 72 Ill. 218. So it is said in *Smith v. Brampston*, 2 Salk. 644, n., that where complete and substantial justice has been done, a new trial will not be granted, though the judge who tried the case may have been mistaken in point of law; nor will the court give a second chance to an unconscionable defense, though the verdict be against the weight of evidence and the strict rule of law. In *McLanahan v. Universal Ins. Co.* 1 Peters, 183, Mr. Justice Story said:—

"It is to be considered that these points do not come before this court on a motion for a new trial after verdict, addressing

Opinion of the Court—Waldo, C. J.

itself to the sound discretion of the court. In such cases the whole evidence is examined with minute care, and the inferences which a jury might properly draw from it are adopted by the court itself. If, therefore, upon the whole case, justice has been done between the parties, and the verdict is substantially right, no new trial will be granted, although there may have been some mistakes committed at the trial. The reason is that the application is not matter of absolute right in the party, but rests in the judgment of the court, and is to be granted only when it is in furtherance of substantial justice. The case is far different upon a writ of error, bringing the proceedings at the trial, by a bill of exceptions, to the cognizance of the appellate court. The directions of the court must then stand or fall upon their own intrinsic propriety as matter of law."

The practice in England in regard to new trials seems to have been to get leave of the judge who presided at the trial to move for a new trial. If leave were granted, the motion was heard on the judge's report before the court in Bank at Westminster, and the decision was final. (*Miller v. Baker*, 20 Pick. 285; *Johnson v. Macon*, 1 Wash. Va. 5.)

There is no express provision in our Code of Civil Procedure for the review of the decision of a Circuit Court on a motion for a new trial. The Code has defined an exception, which must be taken before verdict. A bill of "exceptions," therefore, will not lie more than at common law. An appeal may be taken from an order affecting a substantial right, and which, in effect, determines the action so as to prevent a judgment. (§ 525.) An order denying a new trial does not affect a substantial right. Until the right of appeal is created by statute it does not exist as a strict legal right, nor does it determine the action so as to prevent a judgment. So it is not a final order under the same section, affecting a substantial right, or made in a proceeding after judgment. Such an order is not made after judgment. The motion suspends the judgment. (*Truett v. Legg*, 32 Md. 149; *Page v. Cole*, 123 Mass. 93.) It is not an intermediate order involving the merits of the action under section 535. (See opinion of Selden, J., *St. John v. West*, 4 How. Pr. 329.)

Title 8, Civil Code, § 152, provides for what causes a verdict may be set aside and a new trial granted. Every cause mentioned depends on a question of fact except the last, and certain cases, probably, under the first subdivision. The sufficiency of the evidence under the sixth subdivision is a question of fact, though whether there be any evidence is a question of law. (Buller, J., *Carpenter's Co. v. Haywood*, 1 Doug. 375.)

It has been expressly decided by this court that an appeal will not lie in such cases from a decision on a question of fact. Thus Boise, J., in *State v. Fitzhugh*, 2 Oreg. 236, said:—

“As to those matters which were contained in the affidavits filed in support of the motion for a new trial, they were questions of fact, and were addressed to the sound discretion of the Circuit Court, and are, therefore not the subject of review here.”

And in *Hallock v. Portland*, 8 Oreg. 29, Prim, J., said:—

“As the motion for a new trial was founded wholly upon the insufficiency of the evidence to justify the finding of fact, the granting the motion was a matter resting wholly in the discretion of the court below, and cannot be reviewed on appeal.”

In Massachusetts there is a statute providing that exceptions may be taken to the opinion, ruling, direction, or judgment given or made on a motion for a new trial. The matters of law referred to seem to have been other than those available on a bill of exceptions. But it is there held that a motion for a new trial, so far as it depends on a question of fact, is addressed exclusively to the discretion of the presiding judge. (*Doyle v. Dixon*, 97 Mass. 213.) Hence, no appeal lies from a decision on a motion for a new trial on the ground of newly discovered evidence, or insufficiency of the evidence to justify the verdict, or that the damages are excessive, or on any other question of fact. (*Shea v. Lawrence*, 1 Allen, 167; *Lowell Gaslight Co. v. Bean*, 1 Allen, 274; *Merritt v. Morse*, 113 Mass. 271; *Norton v. Wilbur*, 5 Gray, 7; *Kidney v. Richards*, 10 Allen, 419; *Hubbard v. Gale*, 105 Mass. 511.) Now, if there be no appeal under title 8, page 152, of the Civil Code from decisions on motion for new trials on questions of fact, as has been decided,

Opinion of the Court—Waldo, C. J.

there is, for the same reasons, none on questions of law. If a party choose to move for a new trial in the court below on points contained in his bill of exceptions, there is a question if he must not abandon his exceptions, if so required. (*Sylvester v. Mayo*, 1 Cush. 308; *West v. Cunningham*, 9 Port. 109; *Berry v. Singer*, 10 Ark. 483.) If an appeal were to lie at all from a decision on a motion for a new trial, the proper practice would seem to be to appeal from the order, and thereby preserve the distinct character of the proceeding. (See *Elliott v. Benedict*, 13 R. I. 466.) Or, if the statute were to permit the two proceedings to be joined in the same appeal they should be kept distinct. (See *Ellins v. Boston & A. R. R.* 115 Mass. 190.) It is evident, therefore, that if an order on a motion for a new trial were appealable, the statute should provide that a case should be made specially for that purpose. (*Farmers' Bank v. Whinfield*, 24 Wend. 420.) We have no such provision. A bill of exceptions does not, as we have seen, extend to it. It follows that the assignment of error in overruling a motion for a new trial, so frequently found in our bills of exceptions, is a nullity. It is with us as at common law, and with some of the other States—such matters lie in the discretion of the judge presiding at the trial. (*Sittig v. Birkestack*, 38 Md. 158; *Final v. Backus*, 18 Mich. 218.) It was error, therefore, in the case in hand to examine it as if it were a motion for a new trial. It is here on a bill of exceptions to the directions given the jury. Those which present the most difficulty were on the law of limited partnership under the statute. There was no question of the kind in the case. They were abstract propositions of law which could not be, and were not attempted to be applied to the case. It is claimed, however, that the jury were, or might have been, misled by them. Be it so; but it is not error simply, but error legally excepted to that constitutes ground for reversal. An exception in general terms to an instruction which is correct in point of law can never avail the party on a bill of exceptions. In *Jones v. Osgood*, 6 N. Y. 235, the court say:—

“The exceptions did not call the attention of the judge to the points which were claimed to be erroneous. They did not sug-

gest to his mind what the counsel excepting would have him hold, or wherein his charge was wrong.”

So in *Sharp v. Burns*, 35 Ala. 663:—

“If the charge was ambiguous, or tended to mislead the jury, without asserting an erroneous proposition of law, the defendants should have protected themselves by asking an explanation.”

“The proper practice in such a case is to except to the instruction, and ask that the proper instruction be given. (*Reed v. Call*, 5 Cush. 14; *Edwards v. Carr*, 13 Gray, 238.) Or where, as in this case, the instruction was wholly irrelevant, to call the attention of the court to the fact, and ask that it be withdrawn. (*Carlock v. Spencer*, 7 Ark. 12. See *Warner v. Dunnavan*, 23 Ill. 380; *Pateson, J., Taylor v. Willans*, 2 Barn. & Adol. 861; *Carver v. Jackson*, 4 Peters, 81; *Ex parte Crane*, 5 Peters, 198; *Geary v. People*, 22 Mich. 220; *Stroud v. Frith*, 11 Barb. 302; *Sittig v. Birkestack*, 38 Md. 158.)

The exceptions were themselves misleading. The court could not know in what the alleged error consisted, or what counsel would have. As propositions of law they were not incorrect; or, if so, they did not apply to any issue in the case. “A decision on an abstract question of law, if clearly wrong, is no ground for reversal.” (*Hughes v. Parker*, 1 Port. 144.)

No just objection lies to any other of the instructions. As a question of law, if Foster and Reeves made a contract with Kearney, for cattle to be delivered at a certain time, and upon such delivery they were to execute to Kearney their promissory note in payment, and before the day of delivery arrives Snodgrass and Minor entered into a contract with Foster and Reeves by which they were to become partners in the purchase of the cattle, and if, in pursuance of such an agreement, the note was executed in the name of the partnership, Snodgrass and Minor became liable to Kearney, although Kearney, at the time he took the note knew nothing of such agreement. (*Johnston v. Warden*, 3 Watts, 101.) So the question of sale was one of law, which the court should have decided. The original contract in writing shows that there was no sale prior to the date of the

Points decided.

alleged partnership agreement, and consequently there was no indebtedness to be assumed.

A complete answer to the objections to the special findings of the jury is the original contract itself, which shows but an agreement to sell, on which either party to the contract might have been held liable in damages for failure to perform, but which effected no change of title, nor created any present indebtedness. The jury say in the first finding that there was no purchase. They therefore found correctly what they should not have been called upon to find at all. The second finding related to the formation of the partnership. At that time there was nothing due Kearney on the cattle; consequently they must find, as they did, that Snodgrass and Minor did not assume, for a valuable consideration or otherwise, a debt which did not exist. There is no inconsistency whatever, then, between the special findings so called, and the general verdict.

The above considerations directly and indirectly cover all the points of law argued and relied upon by counsel. They constitute no ground for reversal. The judgment must therefore be affirmed.

THAYER, J., did not sit.

[Filed June 8, 1885.]

STATE OF OREGON v. O. F. BECKER.

MOTION FOR NEW TRIAL—APPEAL FROM—MISCONDUCT OF JUROR.—The ruling of the trial court on a motion for a new trial, on the grounds that a juror had drank intoxicating liquors during the trial, and that the evidence was insufficient to justify the verdict, cannot be reviewed on appeal.

MULTNOMAH COUNTY. Defendant appeals. Affirmed.

Alfred F. Sears, Jr., for Appellant.

John M. Gearin, District Attorney, for Respondent.

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7*	329
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33	152

Opinion of the Court—Lord, J.

By the COURT.—The appellant was convicted of the crime of arson. A motion was made for a new trial, on the ground that one of the jurors had drank intoxicating liquors during the trial, and also on the ground of the insufficiency of the evidence to justify the verdict. The motion was denied, hence this appeal. The questions raised are not the subject of an appeal, as has just been shown in the case of *Kearney v. Snodgrass*, ante, p. 311, and the authorities there cited.

[Filed June 8, 1885.]

CHARLES E. KIRK v. ED. MATLOCK.

REPLEVIN—VERDICT.—Where in an action for the recovery of personal property the plaintiff fails to allege the place from which the property was taken, the defect is cured by verdict.

Id.—JURISDICTION OF JUSTICE'S COURT.—Justices' Courts have jurisdiction of actions of replevin where the value of the property and the damages claimed do not exceed \$250, and such jurisdiction does not depend upon where the cause of action arose, provided the plaintiff or defendant reside in the precinct where the action is commenced, or service be had upon the defendant within the county, or where the defendant does not reside in the State.

UMATILLA COUNTY. Defendant appeals. Affirmed.

Turner, Bailey & Balleray, for Appellant.

Geo. W. Wright, Cox & Minor, and *Wm. M. Ramsey*, for Respondent.

LORD, J.—This is an action brought in a Justice's Court for the recovery of certain personal property. The complaint did not allege the place from which the property was taken. No objection was made to this in any form, but the defendant filed his answer, and upon issue being joined the trial proceeded, resulting in a verdict and judgment for the plaintiff, from which the defendant appealed to the Circuit Court. Before proceeding to trial in the last-named court, the appellant filed a motion for judgment of dismissal, upon the ground that the facts stated did not show that the court had jurisdiction of the subject of the

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14	439
7*	322
13*	117
12	319
37	345
12	319
41	79

Opinion of the Court—Lord, J.

action. At the same time, the respondent filed a motion for leave to amend the complaint by adding the allegation of place omitted. The court allowed the motion to amend, and disallowed the motion to dismiss. Thereupon the appellant refused to plead, and the court ordered a default to be entered, and proceeded to hear said cause for the purpose of assessing damages, which, without further detail, resulted adversely to the appellant. The appellant insists that the omission to allege in the complaint the place where the property was taken and located was fatal to the jurisdiction of the court, and that the court erred in allowing the motion to amend, and overruling his motion for judgment of dismissal. Originally the action of replevin lay only for goods distrained, and as the right of distress, which the action was intended to contest, was at common law local, this would seem to furnish the reason for holding the action to be local. However this may be, there can be little doubt but that the action of replevin at common law was treated as local, and that the action had to be brought in the county where the property was seized and located. (*Williams v. Welch*, 5 Wend. 290; *Atkinson v. Holcomb*, 4 Cowen, 45; *Robinson v. Mead*, 7 Mass. 353; 1 Chitty Plead. *499.) The place was material and traversable, and if it be omitted the defendant may demur. (*Walton v. Kersop*, 2 Wils. 354.) But the omission to state the place in the declaration where the property was seized and located may be cured by verdict. (*Gardner v. Humphrey*, 10 Johns. 54; 2 Chitty Plead. *843, n. h.) If the defendant pleaded *non cepit*, and the plaintiff cannot prove a caption, or that the defendant had the cattle, etc., in the place stated in his declaration, he will be nonsuited. (2 Chitty Plead. *843, n. h.) This is in conformity with the general principle as stated, that "a defect in a pleading, whether of substance or form, which would have been fatal on demurrer, is cured by verdict, if the issue joined be such as necessarily required, on the trial, proof of the facts defectively stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given the verdict." (Proffatt Jury, § 419.)

Opinion of the Court—Lord, J.

The omission, therefore, to allege the place where the property was seized and located was cured or supplied after verdict and judgment, when the defendant pleaded over without making any objection. The Code provides, upon an appeal from a Justice's Court, the action shall be tried anew upon substantially the issues tried in the court below. (Code, § 533.) If the effect of the verdict and judgment in the Justice's Court was to cure the defect now complained of, or supply its omission, the Circuit Court, for the purpose of trying the case substantially upon the issue joined upon the record before it, was authorized to treat the omitted allegation as supplied or waived by the defendant. What difference then could there be in allowing the respondent to do what the record showed the verdict had cured, or the defendant had waived. The amendment allowed by the court did not change the issue tried in the Justice's Court, as proof of the omitted fact was essential to the verdict and judgment as rendered in that court. In furtherance of justice, and upon such terms as may be just, the Circuit Court was authorized to allow the pleadings in the action to be amended so as not to substantially change the issue tried in the Justice's Court. (Justice's Code, § 80, p. 473.)

Treating the case thus far upon the assumption that the action was local, as argued by counsel for the appellant in this court, we do not perceive that there was any error. But is this assumption true as applied to a Justice's Court? For the recovery of personal property distrained for any cause, the Code provides that the action shall be commenced and tried in the county in which the subject of the action, or some part thereof, is situated. (Civ. Code, § 41, subd. 2.) And as the mode of proceeding and the rules of evidence are the same in a Justice's Court as in a like action or proceeding in a court of record, this section applies to a Justice's Court, unless otherwise specially provided by the Code. (Civ. Code, § 880.) For the recovery of specific personal property, when the value of the property claimed and the damages for the detention do not exceed \$250, a Justice's Court has jurisdiction of the action (Civ. Code, § 881, subd. 1), but with the limitations stated. The jurisdiction of a

Argument for Appellants.

Justice's Court does not depend upon where the cause arose, provided that the plaintiff or defendant shall reside in the precinct where the action is commenced, or personal service can be had on the defendant in any precinct in the county; and if the defendant do not reside in the State, the action may be commenced in any precinct in the State. (Code, § 883.)

Plainly, there was no error, in any view which may be applied to the record before us. The judgment must be affirmed.

[Filed June 8, 1885.]

A. D. BRUNDAGE v. MONUMENTAL GOLD AND SILVER MINING CO., H. FLECKENSTEIN, AND S. J. MEYER.

CORPORATIONS—CREDITORS OF—LIABILITY OF STOCKHOLDER—EQUITY—PARTIES.

—In a suit by a creditor to enforce the individual liability of a stockholder for a debt of the corporation, it is not necessary that all the creditors of the corporation be joined, nor that all the stockholders be made defendants.

1D.—In such a suit, if a defendant stockholder desires other stockholders to be made parties, he must bring them in at his own expense by an answer or other proper proceeding.

1D.—When the object of the suit is to wind up the affairs of an insolvent corporation, and it becomes necessary to ascertain the whole amount of the indebtedness, and to whom due, and who are liable to contribute upon unpaid stock subscriptions, such suit should be in the name and for the benefit of all the creditors, and against all the stockholders found within the jurisdiction.

MULTNOMAH COUNTY. Defendants Fleckenstein and Meyer appeal. Affirmed.

H. T. Bingham, and W. B. Gilbert, for Appellants.

It is the general rule that where the remedy is in equity all the stockholders must be joined, unless joinder is shown to be impracticable. (Thompson Liability of Stockholders, § 37; *Umsted v. Buskirk*, 17 Ohio St. 113; *Crease v. Babcock*, 10 Met. 525; *Strong v. Wheaton*, 38 Barb. 616; *Erickson v. Nesmath*, 46 N. H. 371; *Harris v. Dorchester*, 23 Pick. 112; *Mann v. Pentz*, 3 N. Y. 415. And see *Hadley v. Russell*, 40

12	822
24	89
7*	314
82*	759
12	822
40	103

Argument for Respondent.

N. H. 109.) The suit must be brought by or on behalf of all the creditors. (Thompson Liability of Stockholders, § 351; *Harper v. Union M. Co.* 100 Ill. 225; *Low v. Buchanan*, 94 Ill. 76; *Terry v. Little*, 101 U. S. 216; *Crease v. Babcock*, 10 Met. 525; *Umsted v. Buskirk*, 17 Ohio St. 113.)

A. S. Bennett, for Respondent.

It does not appear either from the complaint or plea in abatement that there are any other creditors; and this we think fairly disposes of the objection that the suit is not brought for the benefit of all the creditors of the corporation. (*Hodges v. Silver Hill Min. Co.* 9 Oreg. 200.) But the unpaid stock of a corporation is a trust fund for the payment of the debts of the corporation. (*Union Mutual Life Ins. Co. v. Frear Stone Manuf. Co.* 97 Ill. 537; *Sawyer v. Hoag*, 17 Wall. 610; *Upton v. Tribilcock*, 91 U. S. 45; *Bartlett v. Drew*, 57 N. Y. 587.) A judgment creditor who has exhausted his remedy at law may bring his suit in equity to reach any fund of his debtor which cannot be reached by execution, in his own behalf, and without bringing a general winding-up bill or joining other creditors in the suit. (*Bartlett v. Drew, supra.*) To the objection that the stockholders are not all made parties, we reply that the liability of the stockholders under our Constitution is a several, distinct, and limited liability, as to which each stockholder stands alone, irrespective of the amounts for which others are liable, except that if he pays more than his proportion of such debts, he may as in other cases have contribution from his co-shareholders. (Const. Oreg. art. xi. § 3; *Hodges v. Silver Hill Min. Co.* 9 Oreg. 200; *Hatch v. Dana*, 101 U. S. 205; *Bartlett v. Drew*, 57 N. Y. 587.) The liability of the stockholders being several, the plaintiff was under no obligation to make all of them defendants in his bill. (*Bartlett v. Drew, supra*; *Marsh v. Burroughs*, 1 Woods, 468; *Ogilvie v. Knox Ins. Co.* 22 How. 380; *Hatch v. Dana, supra*; *Pierce v. Milwaukee Con. Co.* 38 Wis. 253.) Even when the rule has been laid down that all the stockholders should be made defendants, it has been enforced only as a rule of convenience, and is

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not insisted on when the parties are very numerous or are out of the jurisdiction. (*Erickson v. Nesmith, supra.*)

LORD, J.—This is a suit in equity to enforce the individual liability of stockholders for an indebtedness of the corporation. The defendants Fleckenstein and Meyer demurred to the complaint upon the grounds that there was a non-joinder of parties plaintiff and defendant, which the court overruled; whereupon the defendants filed an answer in the nature of a plea in abatement, alleging that certain persons not made defendants were stockholders in the defendant corporation, to which the plaintiff demurred, and the court sustained the demurrer, and a decree was taken in favor of the plaintiff, from which the defendants appeal, and present two questions for our determination, viz.: (1) Whether the suit must be brought in the name and for the benefit of all the creditors; and (2) whether all the stockholders must be made parties defendant. The Constitution provides that "the stockholders of all corporations and joint stock companies shall be liable for the indebtedness of said corporation to the amount of their stock subscribed and unpaid, and no more." (§ 3, art. xi. Const.) By this section the liability of stockholders of a corporation is limited to the amount of their stock subscribed and unpaid; and the remedy to enforce this liability, it has been held, is in equity, where the rights of the corporation, the stockholders, and all the creditors can be adjusted in one suit. (*Ladd v. Cartwright*, 7 Oreg. 329; *Hodges v. Silver Hill Min. Co.* 9 Oreg. 200.) The liability of the stockholders for the indebtedness of the corporation constitutes, in part, at least, the basis of its credit, and so far as creditors are concerned, is part of its assets. The unpaid subscriptions to the capital stock, due from the stockholders to the corporation, are regarded in equity as a trust fund, to be held by the corporation for the benefit of its creditors. As said by Mr. Chief Justice Waite, in *Patterson v. Lynde*, 106 U. S. 520:—

"The Constitution of Oregon created no new right in this particular; it simply provided for the preservation of an old one. The liability under this provision is not to the creditors,

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but *for* the indebtedness. That is no more than the liability created by the subscription. The subscription is part of the assets of the corporation, at least so far as creditors are concerned. The liability of the stockholders to the creditor is through the corporation, not direct. There is no privity of contract between them, and the creditor has not been given, either by the Constitution or statute, any new remedy for the enforcement of his rights. The stockholder is liable to the extent that the subscription represented by his stock requires him to contribute to the corporate funds, and, when sued for the money he owes, it must be in a way to put what he pays directly or indirectly into the treasury of the corporation for distribution according to law. No one creditor can assume that he alone is entitled to what any stockholder owes, and sue at law so as to appropriate it exclusively to himself."

The liability, therefore, of the stockholders upon their unpaid subscription to the capital stock being a trust fund in equity for the payment of the debts of the corporation, all the creditors are entitled to share in it. As a result of this doctrine, the general proposition is well sustained by the authorities that a judgment creditor of the corporation, who has exhausted his remedy at law, may maintain a suit in equity in his own behalf, and in behalf of such other creditors of the corporation as may unite to become parties with him, against the corporation and its delinquent stockholders, and have a decree that an account of the assets and debts of the corporation be taken, and that the stockholders pay in and account for so much as may be due from them respectively to the corporation on account of their capital stock, as will be sufficient to pay the debts represented by the plaintiff and such other creditors as may join. (*Adler v. Manuf. Co.* 13 Wis. 63; *Mann v. Pentz*, 3 N. Y. 415; *Ogilvie v. Knox Ins. Co.* 22 How. 380; *Crease v. Babcock*, 10 Met. 525; *Umsted v. Buskirk*, 17 Ohio St. 113; *Wood v. Dummer*, 3 Mason, 308; *Thomp. Liab. Stock*, § 351; 2 Story Eq. Juris. 1252.) When the object of the bill is to settle or wind up the affairs of the corporation which is insolvent, and it becomes necessary to ascertain the whole amount of the indebtedness and to whom due, and also

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who are liable to contribute upon their unpaid stock subscriptions, the necessity of bringing the suit in the name and for the benefit of all the creditors of the corporation, and against all the stockholders found within the jurisdiction, is conceded. But when the bill is not brought for that purpose, although in the form of an ordinary creditor's bill, as the case here, but seeks solely to obtain the payment of the plaintiff's judgment, and it does not appear by the bill or otherwise that there are any other creditors who wish to be made parties, a judgment creditor who has exhausted his legal remedy ought not to be stayed in his suit to pursue any equitable interest or demand of his debtor, in the absence of any showing by them objecting that there are any other creditors.

Upon the facts as presented by this record we do not think the first objection available. But it is upon the second point, that all the stockholders of the corporation should be made parties defendant, that the defendants more strenuously insist. Upon this point the substance of their contention is that the effect of the decision in *Ladd v. Cartwright*, *supra*, establishing the remedy of the creditor of an insolvent corporation in equity and not at law, to enforce the liability of the stockholder upon his unpaid subscriptions, where, as the court say, "the rights of the corporation, the stockholder, and all the creditors can be adjusted in one suit," necessarily precludes the right of such creditor to proceed against one or more delinquent stockholders for his debt. But this does not follow from the mere fact that the suit is in equity and not at law. When the object of the bill is to wind up the affairs of the insolvent corporation, and the presence of all parties is necessary to properly adjust the equities, and to avoid a multiplicity of suits, they may be brought in and made parties. This is only the advantage which equity affords when the nature of the suit requires it. But it is not enough to defeat a creditor's right to pursue his remedy in equity, when he seeks to obtain the payment of his judgment against an insolvent corporation by subjecting some equitable interest or demand due it, by simply suggesting, in way of answer in abatement of the suit, that there are other stockholders. While it is true that the liabil-

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ity of the stockholder upon his unpaid subscription is not to the creditor, but for the indebtedness of the corporation, yet as a debtor to the corporation upon such unpaid stock, it may be pursued in his hands. "A judgment creditor," says Mr. Justice Bradley," who has exhausted his legal remedy, may pursue in a court of equity any equitable interest, trust, or demand of his debtor in whosoever hands it may be. And if the party thus reached has a remedy over against other parties for contribution or indemnity, it will be no defense to the primary suit against him that they are not parties. If a creditor were to be stayed until all such parties could be made to contribute their proportionate share of the liability, he might never get his money." (*Marsh v. Burroughs*, 1 Woods, 468.) And as the object of the present bill is not to settle the affairs of the corporation, but is brought simply for the purpose of securing the payment of the judgment debt out of the unpaid stock subscriptions, we think the language of Mr. Justice Strong in *Hatch v. Dana*, 101 U. S. 210, peculiarly applicable to the case under consideration, and decisive of it. He said:—

"The liability of a subscriber for the capital stock of a company is several and not joint. By his subscription each becomes a several debtor to the company, as much so as if he had given his promissory note for the amount of his subscription. At law, certainly, his subscription may be enforced against him without joinder of other subscribers; and in equity his liability does not cease to be several. A creditor's bill merely subrogates the creditor to the place of the debtor, and garnishes the debt due to the indebted corporation. It does not change the character of the debt attached or garnished. It may be that if the object of the bill is to wind up the affairs of this corporation, all the stockholders, at least so far as they can be ascertained, should be made parties, that complete justice may be done by equalizing the burdens, and in order to prevent a multiplicity of suits. But this is no such case. The most that can be said is that the presence of the stockholders might be convenient, not that it is necessary. When the only object of a bill is to obtain payment of a judgment against a corporation out of its credits or intangi-

ble property, that is, out of its unpaid stock, there is not the same reason for requiring all the stockholders to be made defendants. In such case no stockholder can be made to pay more than he owes."

So also in *Ogilvie v. Knox Ins. Co.* 22 How. 380, it was objected, as here, that the bill was defective for want of proper parties, but the court held the objection untenable. In delivering the opinion of the court, Grier, J., said:—

"The creditors of the corporation are seeking satisfaction out of the assets of the company, to which the defendants are debtors. If the debts attached are sufficient to pay their demands, the creditors need look no further. They are not bound to settle up all the affairs of the corporation, and the equities between its various stockholders, corporations, or debtors. If A is bound to pay his debt to the corporation in order to satisfy his creditors, he cannot defend himself by pleading that these complainants might have got their satisfaction out of B as well. It is true, if it be necessary to a complete satisfaction of the complainants that the corporation be treated as an insolvent, the court may appoint a receiver, with authority to collect and receive all the debts due to the company, and administer all the assets. In that way all the other stockholders may be made to contribute."

See also *Bartlett v. Drew*, 57 N. Y. 587; *Pierce v. Milwaukee Con. Co.* 38 Wis. 253.

In this suit the parties are shown to be numerous and widely scattered. It is brought against twenty-two stockholders, and the plea in abatement shows that there are thirty-four others living in four different counties. Nor is there any pretense that this is all, or that they are within the jurisdiction of the court. To abate this suit and compel the plaintiff to begin anew, so as to make these stockholders designated in the plea in abatement parties defendant, then, out of the numerous shares still unaccounted for, when these new defendants are brought in, other stockholders may be pointed out, and the process of abating the suit carried to an extent that would amount to a practical denial of justice. The contention of the plaintiff is that it is not his business to bring in these new parties, but that if the defend-

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ants want other stockholders brought in for the purpose of equalizing the burdens by contribution among themselves, it being for their benefit and interest, they must bring them in at their own expense by an answer or other proper proceeding.

In *Hatch v. Dana*, *supra*, in further delivering the opinion of the court, Strong, J., said:—

“That the complainant was under no obligation to make all the stockholders of the bank defendants in his bill. It was not his duty to marshal the assets of the bank, or to adjust the equities between the corporators. In all that he had no interest. The appellants may have had such an interest, and, if so, it was quite in their power to secure its protection. They might have moved for a receiver, or they might have filed a cross-bill, obtained a discovery of the other stockholders, brought them in, and enforced contribution from all who had not paid their stock subscriptions. Their equitable right to contribution is not yet lost.”

We think the decree of the court below must be affirmed.

[Filed June 8, 1885.]

ALEX. GRANT, ADMR., v. W. D. BAKER ET AL.,
CONSTITUTING COMMON COUNCIL OF ASTORIA.

PRACTICE—NONSUIT.—To authorize the court to nonsuit a plaintiff, there must be such a total failure of proof of a material allegation of the complaint as would require the court to set aside the verdict for want of evidence, if the jury were to find for the plaintiff.

DEFENSE—CONTRIBUTORY NEGLIGENCE.—Contributory negligence is a defense, and must be averred as such. (*Walsh v. Or. Ry. & N. Co.* 10 Oreg. 250, distinguished.)

CLATSOP COUNTY. Plaintiff appeals. Reversed and new trial ordered.

G. W. Yocum, and Raleigh Stott, for Appellant.

F. R. Strong, for Respondents.

THAYER, J.—The appellant commenced an action in the

12 329
14 221
19 144
7* 318
13* 104
23* 885

12 329
23 99
7* 318
31* 284

19 329
26 564
7* 318
33* 708

12 329
35 532
12 329
33 147

12 329
41 86

12 329
45 483
12 329
46 242

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Circuit Court for Clatsop County against the respondent, to recover damages for wrongfully causing the death of Peter Grant. The appellant alleged in his complaint, in substance, that he was the administrator of said Peter Grant, and that the respondents were officers of the municipal corporation of the city of Astoria, in said county, constituting the common council of said city; that by the charter of said city it was the duty of the said common council to keep the streets of the said city in good order and repair, and safe for travel; that they wilfully neglected their duty, and permitted one of the said streets, known as "Squemoque Street," to become so much out of repair that it became unsafe for travel, and that, after being notified of the fact, they refused to repair it; that while said Peter Grant was lawfully traveling said street on the 27th day of November, 1881, and wholly unaware of the danger, he was accidentally, and without fault on his part, precipitated over the edge of the roadway, and thereby killed, which accident the appellant alleged was in consequence of the respondents' said neglect. The respondents filed an answer to the said complaint, in which they denied all the allegations thereof; and thereafter, at the January term, 1884, of said court, the issues so formed came on for trial before the said court, and a jury duly impaneled.

The appellant upon the trial gave evidence tending to prove the facts alleged in his complaint. It appears from the bill of exceptions that said Peter Grant was last seen alive on the evening previous to the said 27th day of November, 1881; that on the morning of that day he was found dead, lying in the mud and water in front of said street, opposite to where a railing had been off for some time. It also appears that said deceased had his lodgings at a house on said street, and that when last seen, upon the evening previous to his death, he was at the Occident Hotel, in Astoria; that between 10 and 11 o'clock at night he left there with the evident intention of going to his lodgings; that his route would naturally be along said street, which was considerably encumbered with lumber at the time. The evidence offered was doubtless sufficient to authorize the inference that

the deceased, while going to his lodgings on said occasion, and along said street, fell from the same to the place where he was found dead, in consequence of its being so filled up with timber and lumber, and the rail being off the side, placed there as a protection to persons passing along the same. The street appears to have been upon piles across some tide land, and several feet above the surface.

The appellant having rested his case, the respondents moved the court for a nonsuit, upon the grounds, (1) that the evidence was insufficient to entitle the appellant to a recovery; (2) that the appellant had failed to show that the deceased was without fault at the time of the accident; that the appellant was required to show that deceased was, at the time of his death, free from contributory negligence, before a recovery could be had. The Circuit Court granted the motion, and the appellant was nonsuited, and judgment entered against him for costs, from which judgment this appeal is taken.

The first ground of the motion for the nonsuit was wholly untenable. The question whether the evidence was sufficient to entitle the appellant to a recovery was for the jury, and not the court. To authorize the court to nonsuit a plaintiff, the latter must fail to prove a cause sufficient to be submitted to the jury. It must be such a case that, if the jury were to find a verdict for the plaintiff, the court could be required to set it aside for want of evidence to support it. (Civ. Code, §§ 243, 244.) It would have to be a case where there was a total failure of proof of some material allegation of the complaint, which appears, from the bill of exceptions, not to have been the fact in this case. I do not suppose the nonsuit was granted upon that ground. It was not so claimed on the argument, and I think the counsel on both sides concede that it was upon the second ground of the motion that it was allowed, and that the circuit judge, in allowing it, followed what he supposed to have been held in *Walsh v. Oregon Ry. & Nav. Co.* 10 Oreg. 250. The impression seems to have prevailed, to some extent, at least, that this court there held that a plaintiff would not be entitled to recover in an action for negligence without showing affirma-

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tively that the injury was not the result of his own negligence; that he would have to first establish that there was no contributory negligence upon his part. I do not think that is the law, nor that the case of *Walsh v. Oregon Ry. & Nav. Co.* intended to hold any such doctrine. I suppose it was inferred that the court meant to lay down such a rule in the following language employed by the judge who delivered the opinion in the case:—

“In actions for negligence, the burden of proof always rests upon the party charging it. He must prove that the accident was caused by the wrongful act, omission, or neglect of the defendant, and that the injury of which he complains was not the result of his own negligence, and the want of ordinary care and caution.”

A casual observation of this language might justify the impression referred to; but when considered in connection with the facts of that case, and with other portions of the opinion, it would hardly be warranted. The plaintiff in the case referred to was a brakeman on the defendant's train of cars. The track had been widened from a narrow gauge to a standard gauge, and the effect was to place the rail on one side of the bed nearer the water-tank located on the road. The train approached the point opposite the tank in the night, while the plaintiff was on the train attending to his duties. He was ignorant of the nearness of the water-tank to the track; heard a noise ahead that excited his suspicion that something might be wrong, and put his head out of the window to discover the cause. In the act of doing that, in consequence of the proximity of the tank to the track, his head came in collision with the timbers which supported the tank, and thereby he received the injury complained of. When he attempted to prove his cause of action upon the trial, these facts, of course, all came out upon his own showing, and the Circuit Court before whom the trial was had, being of the opinion that the putting his head out of the window as mentioned was carelessness upon his part which contributed to the injury, nonsuited him. The question then came before this court as to whether the nonsuit was properly granted, and

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in the consideration of that question the language quoted was made use of. The judge, in the opinion, also stated the following:—

“To entitle, then, the plaintiff to recover, conceding the negligence of the defendant in not removing the water-tank to the proper distance after widening the track, it was incumbent on him to prove, when the accident occurred, that he exercised that ordinary care which a party ought to observe under the particular circumstances under which it is to be exercised.”

It will be seen that the injury to the plaintiff in that case was the result of his own direct act; if he had not put his head out of the window it would not have collided with the framework of the tank; and that, *prima facie*, he occasioned it himself. Whether the act was careless and negligent or not depended upon the facts, which it devolved upon him, under the peculiar circumstances of the case, to prove; and unless he established that the duty of his position made it necessary and proper to extend his head out of the window at the time, he had no case. The Circuit Court thought he had no right to do so under any circumstances; but this court, in view of the fact that the plaintiff was a brakeman on the train, and was required to constantly keep a lookout to avoid danger, and that there was evidence in the case tending to prove that it was a customary habit for brakemen to do so, concluded that he ought not to have been nonsuited, and therefore set it aside and ordered a new trial. It is very evident to my mind that the language of the opinion referred to was intended to apply to the state of facts mentioned, and not to lay down any general rule that would be applicable to any state of facts that might appear in that character of cases. I think it has always been understood by this court that contributory negligence is a defense, and must be averred as such. At the same time, the authorities agree that if it appears in such a case, upon the plaintiff's own showing, that his own carelessness helped to produce the injury he complains of, he cannot recover. And I do not believe it would be any departure from the rule requiring such a defense to be

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pleaded to say, as was said in *Walsh v. Oregon Ry. & Nav. Co. supra*, where the plaintiff has been the actor in the affair in which the injury was received, and his acts *per se* would indicate negligence, "that he could not recover without proof that he exercised that ordinary care which a party ought to observe under the particular circumstances." Upon the other hand, where the injury results from the direct act or omission of the defendant, which *prima facie* is negligence in itself, and the plaintiff receives an injury in consequence thereof while pursuing his ordinary course of affairs, he will not be compelled, in order to recover his damages, to prove that he was free from fault. For instance, suppose that some of the timbers of the frame-work of the water-tank referred to had been left so as to strike against a car, and that they did so strike and injure either the brakeman or a passenger who was sitting upon a seat inside, it would not certainly be necessary for the injured person, in order to recover against the company, to prove that he was free from fault; while, if he were apparently out of his place, or doing some act from which negligence might be imputed, it would become necessary to explain his conduct, and prove that, however it might seem, it was not negligence, or at least did not contribute to the injury.

In the case at bar the court should not have nonsuited the plaintiff. He made out a case sufficient for the jury, and they had a right to determine whether the conduct of the defendants in leaving the street encumbered in the manner described by the witnesses, and allowing a section of the railing to remain off, was negligence or not; whether the deceased came to his death in consequence thereof, and whether he might in some manner have contributed to the negligence, if any such existed. The latter could not be inferred except from some proof of circumstances. It is not presumable that a person will do careless and negligent acts that will jeopardize his own life; and yet, if the deceased knew the condition of the street, and it was a dark, rainy night, as some of the witnesses say it was, it might have been very imprudent for him to have attempted to travel the street under the circumstances. However that may have been,

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the question is one that a jury must determine, under the instructions of the court, as to the law.

The judgment must be reversed, the nonsuit set aside, and a new trial had.

[Filed June 10, 1885.]

JOSEPH MANAUDAS v. S. A. HEILNER AND E. D. COHN.

CONTRACT—MORTGAGE.—The contracts between the parties construed, and held to constitute a mortgage.

WASCO COUNTY. Defendants appeal. Decree modified.

L. O. Sterns. and Bonham & Ramsey, for Respondent.

L. L. McArthur for Appellants.

THAYER, J.—This suit was originally begun in Baker County. The venue was changed to suit the convenience of the parties to said county of Wasco. The suit was to compel an accounting, and to decree a recovery of certain real and personal property from appellants to the respondent. It appears from the proofs and pleadings in the case that the appellants, for some time past, have been engaged in merchandising in the county of Baker, and that the respondent has been engaged in mining there; that the respondent some years ago opened an account with appellants, and with other mercantile firms doing business in that county, with which the appellants had partnership connections; that on the 26th day of March, 1878, the respondent was indebted to appellants on account in the sum of \$1,981, and thereupon made an absolute transfer to them of a large amount of real and personal property, consisting of mining claims, flumes, etc.; also a lot in Baker City, in said county, and certain personal property; and that on the 27th day of March, 1878, said appellants and respondent entered into a written agreement relating to the said transfer of said property,

12	336
14	451
22	528
7*	347
13*	449
30*	423

12	336
26	601
7*	347
37*	56
12	336
29	324

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and which evidently was a part of that transaction, of which agreement the following is a copy:—

“This agreement, made this 27th day of March, 1878, between S. A. Heilner and E. D. Cohn, of Baker County, Oregon, and Joseph Manaudas, of the same place, witnesseth: That whereas, on March 26, 1878, said Manaudas sold and conveyed by bill of sale, for consideration mentioned of \$1,000, to said Heilner & Cohn, a large number of placer mining claims, flumes, structures, house on claims, blacksmith tools and appurtenances, stock, cattle, and horses, known as the Leatherwood mining and other property, situated on Quartz Gulch, and other places in Shasta and Willow Creek mining district, in Baker County, Oregon; and also conveyed, by deed executed by himself, certain ditches and water rights, flumes, and property to said Heilner & Cohn, for consideration mentioned at \$561, at same date, said ditches and water-right property being known as the Leatherwood ditch and water-right property, in and about said Shasta mining district, in said county and State, said property and bill of sale and deed being of record in the clerk's office in Baker County, Oregon.

“And whereas, on said date, one Peter Mann, for consideration of \$325 expressed, executed his deed to said Heilner & Cohn for lot 2, in block 2, of Fisher's addition to Baker City, Oregon, with tenements and appurtenances, which deed is of record in said county, said considerations being debts for the most part of said Manaudas, assumed, paid, and settled by the said Heilner & Cohn for the said Manaudas, amounting in the aggregate to \$1,886 and interest, amounting to \$95; total, \$1,982.

“Now, therefore, it is agreed by and between the parties that, if the said Manaudas shall repay the said amount of \$1,980 in gold coin to the said Heilner & Cohn, with twelve per cent per annum interest thereon, from date hereof, in manner and form as follows, to wit, on or before January 1, 1880; and said Manaudas promises to pay the said sum from and out of the gold extracted and cleaned up from the working of the said mines, or part thereof, so conveyed to said Heilner & Cohn, and hereinafter let to said Manaudas, who hereby covenants to work

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some part of said mines, or all that may be practically or profitably worked, at his own expense in all things, in workmanlike manner, with diligence, economy, and dispatch, to the end that said payment of said sum may be made as early as possible before the said date. And in consideration of the premises, and one dollar to them paid by said Manaudas, the said Heilner & Cohn let the said mines, mining property, ditches, water rights, and interests to the said Manaudas for the term of two years, to be worked and operated by him at his own expense, in a workmanlike manner, according to the customs, laws, and usages of said mining district, and of the State and of the United States, to the end that the title thereto shall be protected from forfeiture, and at every clean-up the net proceeds of gold extracted from the working of said mines shall be immediately paid over to said Heilner & Cohn, to be applied by them towards payment of said sum until said sum is fully paid; and when so paid, or if paid in any other manner by said Manaudas before said January, 1880, that then said Heilner & Cohn agree to reconvey all the said property to the said Joseph Manaudas, or such right or title as they may then have therein.

“And it is agreed by parties herein that in case of the failure of the said Manaudas to pay the said sum, or make substantial default herein, that then said deeds and bill of sale shall become absolute at the option of said Heilner & Cohn, who may enter and take peaceable possession thereof from the said Manaudas, and sell and dispose of the same as they may deem best.”

It appears that after the execution of the above agreement the said respondent continued to deal with the said appellants, and with other firms with which they were connected in business, and purchased from them goods, wares, and merchandise, and they advanced him money and paid money at his request, and for his use, and that respondent in return paid to appellants gold-dust and money; that they continued their mutual dealings until some time in July, in the year 1880, when the appellants, with the knowledge and consent of the respondent, entered into a written agreement with one W. B. Benson in regard to certain of the property transferred to them by the respondent,

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and referred to in their said agreement of March 27, 1878, before set out. The latter is as follows:—

“This agreement, made and entered into the —— day of July, 1880, between S. A. Heilner and E. D. Cohn, of Baker City, the parties of the first part, and W. B. Benson, of the same place, the party of the second part, witnesseth: That the parties of the first part, in consideration of the covenants and agreements on the part of the said party of the second part, hereinafter contained, agree to sell unto the said party of the second part the following described placer mining ground, and water rights and ditch property, situate in Shasta mining district, Baker County, Oregon, to wit [here follows lengthy description of the property], for the sum of \$8,000, and the said party of the second part, in consideration of the premises, agrees to pay to the said parties of the first part the said sum of \$8,000, in manner following, to wit, \$1,000 on the execution of these presents, and as to the other payments the party of the second part agrees to take possession of said mining property, and with a sufficient force of men diligently work the same in a skillful and proper manner, during the mining seasons when water can be purchased or had at the rate of twelve and one half cents per inch, and with a sufficient amount of water to work to advantage, when it can be had, and first work up through the Campbell ground, and then otherwise, to the best advantage, to extract, wash out, and clean up the gold contained in said mining ground, and at each clean-up hereafter the said party of the second part agrees to pay over and deliver, in good, clean gold-dust, one third of the gross proceeds of all gold so washed out, extracted, and cleaned up, without delay, as soon as so cleaned up; and out of the remaining two thirds of each clean-up of gold so made hereafter, after deducting all expenses of working said claims during the run, then to pay over and deliver to the parties of the first part whatever gold-dust may remain of such clean-up, and the said gold-dust so paid over and delivered to the parties of the first part at such time of each clean-up shall be applied and credited on this agreement, as a part payment of said purchase money, at the rate of seventeen dollars

per ounce; until the balance of said purchase money is fully paid.

“And the party of the second part also agrees that out of all the gold-dust extracted and cleaned up out of any drift dirt, the full one half thereof, when so extracted, washed out, and cleaned up, shall be immediately paid over and delivered to the said parties of the first part, and applied and credited on this agreement as a part payment of said purchase money, until the same is fully paid. And the party of the second part fully agrees to keep an account of all the gold-dust washed out, extracted, and cleaned up in the working of said mining ground by the use of said Birch Creek water, used for working said claims in the spring, and to use the same therefor to the best advantage each spring; and out of the gross proceeds of all gold-dust cleaned up by use of said water, to pay over, at the close of the Birch Creek water season, the full one half of such gross proceeds to the said parties of the first part, to be applied as a part payment on the purchase money of this agreement, until the balance remaining due is fully paid. And the said party of the second part agrees to notify said parties of the first part of the time or times of each and every clean-up of said mining claims so worked, and permit them or their agents to be present to witness such clean-up. And the said parties of the first part agree to deliver immediate possession of said premises to the party of the second part, to the end that the said mining ground may be so worked, and the balance of said purchase money of \$8,000 so paid from such proceeds of gold extracted therefrom, and from such water rights and ditches in manner aforesaid.

“And the parties of the first part also agree that on receiving the said sum of \$8,000, at the times and in the manner above mentioned, or if paid otherwise or sooner by the said party of the second part, they will execute and deliver to the said party of the second part, at their own proper cost, a good conveyance of all their right, title, and interest in and to all said property. It is further agreed and understood by the parties hereto that should the party of the second part make default in any substantial particular in the performance of his part of this agree-

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ment, that then the parties of the second part may, at their option, re-enter and take possession of said premises and terminate this agreement, and the party of the second part shall forfeit all right to a conveyance of said property, and all right of possession thereof, and of the purchase money paid thereon, as damages for such default in the performance of his part of this agreement; and it is understood that the stipulations aforesaid are to apply to and bind the heirs, administrators, and assigns of the respective parties; and it is further agreed by the said party of the second part that he shall not sell, assign, mortgage, or pledge his interest in this agreement, or in said property, or any part thereof, or deliver possession thereof, to any person or persons other than the parties of the second, except by permission of the parties of the first part. And it is further understood that this agreement is to sell all the mining claims and property situate in and adjacent to Quartz Gulch, heretofore sold by W. J. Leatherwood to Joseph Manaudas, and by John Campbell to said Manaudas; that all erasures and interlineations herein were made before execution thereof.

"In witness whereof, the parties of the first part hereto set their hands and seals, and the said party of the second part also sets his hand and seal, the day and date first above written.

[SEAL.]

"S. A. HEILNER & Co.

[SEAL.]

"W. B. BENSON.

"In presence of—JOS. MANAUDAS.

"HERMAN HAAS."

It appears, also, that the respondent occupied and worked the mining ground referred to in said last-mentioned agreement, until the time of the execution of the said agreement, when it was turned over to the said Benson, and thereupon he began working it in accordance with the terms thereof. It further appears that sometime in May, 1879, a suit was commenced in the Circuit Court for said county of Baker, by one James Lynn, against the appellants, respondent, and a ditch company, consisting of Packwood and Carter, to restrain them from running what is termed "tailings" onto Lynn's mining ground, by running water from the ditch of said Packwood and Carter down

through certain flumes of said Lynn, said water supplying said mines referred to in the said written agreement with said Benson; that said suit involved a large expense in procuring witnesses, and on account of attorney's and referee's fees, and other incidental expenses; that it continued pending until the March term, 1880, of said Circuit Court, when it was heard; and on the 4th day of August of that year a final decree was entered therein, and each party required to pay one half the costs and disbursements of the suit, including the fees of the referee and commissioner appointed to execute the decree. A controversy arose in regard to the taxation of the costs and disbursements, and they were not adjusted till July, 1881, at which time they were adjusted by the court upon appeal from the decision of the clerk in the taxation thereof. It further appears that on the 15th day of December, 1880, the respondent and appellants had a settlement of their affairs; that appellants brought forward an account for general merchandise furnished the former, and of money advanced and paid for him, and also accounts of the other firms before referred to, and which accounts contained credits in favor of the respondent for gold-dust and money received from him, also from the proceeds of the mine under the management of said Benson; that in said settlement there was included said accounts of the appellants and the credits of the respondent; and that in the adjustment there was found due from the respondent to appellants the sum of \$453. At that time the respondent was about to make a visit to France, and he borrowed from the appellants, through Mr. Cohn, one of the members of the firm, \$547, and executed to Cohn, for said firm, his promissory note for \$1,000, covering the balance of the account and the borrowed money. It further appears that Benson, when he entered into the agreement with the appellants of July, 1880, did not pay the \$1,000 therein agreed to be paid on the execution thereof, but that he executed his promissory note therefor to Heilner, one of said firm, and Mr. Cohn, the other member thereof, indorsed it. Said note was never paid, but is still in the hands of appellants. And it further appears that the appellants paid certain of the costs and expenses of said suit brought by Lynn, and

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claim to have paid the following items and to the following named persons, on account of said suit, and that they are entitled to charge the respondent with the amount, viz.: To I. D. Haines, \$300; to I. B. Bowen, \$172.50; to Grier & Kellogg, \$117; to Mrs. Howard, \$27; to John Fenman, \$8; to S. H. McLaughlin, \$145; to I. B. Bowen, \$87.25; to Joseph Shinn (referee's fees), \$800; to James Lachner, \$96.50; to C. M. Foster, \$40; to Lawrence & Shinn, \$500; to T. C. Hyde, \$119; to E. L. Bradley, \$16; to H. Deckman, \$46.

Subsequent to the said 15th day of December, 1880, the appellants made the following advancements, to and for the respondent, of money and goods, viz.:—

February 25, 1881.	Remittance to France.....	\$125 00
April 4,	“ Paid Stearns & Balleray note.....	708 00
“ 18,	“ Telegraphic Exchange.....	105 50
May 18,	“ Cash.....	25 00
July 26,	“ Ottenheimer & Co.'s account.....	115 00
	Washington Gulch account.....	17 00
	Kauffman & Co.'s account.....	99 00

And it further appears that the appellants received from the proceeds of said mine, subsequent to the said 15th day of December, 1880, gold-dust amounting in value to the sum of \$1,496.41; that the same was received July 17, 1881.

These general facts are the *data*, as I view the case, from which an adjustment and settlement of the mutual accounts and claims between the parties is to be made. Some questions have been made in regard to the relations of the parties, created by their agreement set out herein, but there can be no serious difficulty from that source. The instrument operated as a mortgage beyond doubt. Another question presented is as to the amount for which the appellants became liable upon the agreement with Benson; but that is easy of solution. The appellants are chargeable with no more than they received from the working of the claim by Benson under the agreement, unless they are to be charged with the Benson note of a thousand dollars. There would be no difficulty in arriving at a correct conclusion if we could ascertain when the expenses of the Lynn suit were paid,

and whether they were included or not in the settlement of December 15, 1880. The respondent insists that the portion thereof he was liable to pay was included in the settlement, but the appellants contend that the respondent is liable for the whole expense paid by them on account of said suit, and that the expense was not included in the settlement; that the suit was not then terminated; and that the bill of items upon which the settlement was made shows that they could not have been included. The counsel who tried the case here seemed to have overlooked the importance of having an account taken between the parties by some competent accountant, and contented themselves with the introduction, at the hearing of depositions. The case should not have been submitted in that style; a good book-keeper would have been much more effective in ascertaining the rights of the parties than a jurist; but the case is here, and we must dispose of it by the aid of such evidence as we have before us, or send it back and have the facts more thoroughly investigated.

The circuit judge who heard the case found that there was a balance due the appellants from the respondent of \$531.35. As I understand it, he allowed to the appellants one third of the expenses paid or claimed on account of said Lynn suit, after reducing the referee's fees from \$800 to \$325, and allowed the thousand-dollar Benson note in favor of the respondent. The basis of his computation may have been just, but I do not see how the result could have been reached, in view of the unsatisfactory character of the evidence, by any certain mode. At least, I feel that the attempt to approach the real truth in the case is a groping effort. It hardly seems equitable to charge the appellants with the Benson note, when they realized nothing therefrom, nor are ever likely to. Again, the appellants have not produced a single voucher showing that they have paid any single item of the expense of said suit. Heilner testified that he had paid the several items before mentioned, but did not state when he paid them, nor were the parties to whom the payments were claimed to have been made produced. Besides, the accounts the appellants exhibited of merchandise and money furnished the respondent prior to said 15th

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day of December, 1880, were far from satisfactory, and contained unconscionable charges of interest; but, as the parties settled them, we do not feel at liberty to question their correctness, and would not refer to the matter except as a circumstance tending to raise a suspicion against the other account. In my opinion, it would be doing justice in the case to determine that the debts for which the transfer of the property was made by respondent to secure, and the other indebtedness which has accrued since, have been paid. The appellants have had possession of the property for a number of years. It has been productive, and they have received large payments from respondent, and kept the only account of the transactions we have; and if they have not been able to liquidate the indebtedness under the circumstances, or show by satisfactory proof that it has not been paid, they ought to forgive it, and grant the respondent a jubilee after the manner of an ancient and venerable custom.

There are, however, other circumstances to be considered. A good deal of the property included in the instrument by which the transfer was made to the appellants was never delivered to them, nor did they have possession thereof. That property, of course, should not be included in the decree for a reconveyance, nor should the property that has been sold by appellants, where the respondent has been credited with the price, be decreed to be reconveyed, except upon condition that the respondents pay such price. It appears that the appellants sold the barber shop in Baker City on December 30, 1879, for \$675. This may or may not have included said lot 2 of block 2 of Fisher's addition, as described in the contract between appellants and respondent, before mentioned. However that may be, the respondent has been credited with the \$675, as will be seen upon the appellants' exhibit of accounts, and he should not have the property back except upon condition that he pay appellants that sum. Under the view suggested, the decree herein should be that the appellants, within sixty days after the entry of this decree in the court below, execute and deliver to the respondent a good and sufficient deed or other instrument of reconveyance of all the property conveyed to them by the conveyance of March 26, 1878, except such personal

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property as was not delivered to them or retained by respondent, and except, also, such property as the appellants have sold that was so conveyed to them, and the price therefor has been credited to respondent upon accounts between them which have been settled, unless the respondent pays to appellants such purchase price, and the respondent shall recover costs of this appeal; that the decree appealed from be affirmed, except so far as modified by the decree herein.

Let a decree be entered accordingly.

[Filed June 10, 1885.]

HIRAM BROWN ET AL. v. SCHOOL DISTRICT
No. 1 ET AL.

ILLEGAL TAX—INJUNCTION.—Where the legality of a tax is disputed as to a part only, it is the duty of a plaintiff before bringing a suit to enjoin the collection of the disputed portion to pay or tender the part admitted to be valid. Otherwise his complaint will be dismissed.

ID.—PAYMENT UNDER PROTEST.—One who is compelled to pay an illegal tax may pay the same under protest and recover it back by a proper proceeding.

CLATSOP COUNTY. Plaintiffs appeal. Affirmed and complaint dismissed without prejudice.

C. H. Page, for Appellants.

C. W. Fulton, for Respondents.

THAYER, J.—This appeal is from the Circuit Court for the county of Clatsop. The appellants commenced a suit in that court against the respondents to restrain the enforcement of a certain school tax, levied upon the taxable property thereof by a vote of the legal voters of a school meeting held in the above-named district on the 15th day of July, 1884. The appellants are tax-payers of said school district, and have been assessed large sums on account of said tax. The object of the tax, as appears from the pleadings in the suit, was for the following purposes, and made up of the following items, viz.: One and

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one third mills on the dollar for school purposes; one and two thirds mills on the dollar for the purpose of paying interest on the bonds issued by the district; and one half of one mill on the dollar for the purpose of making necessary improvements to the school-house block owned by the district. It appears that said tax was assessed in due form upon the property in the district, but that the appellants refused to pay their assessments, and were returned upon the delinquent list, which was placed in the hands of the sheriff of said county for collection, as provided by law, and that the sheriff is about to sell their property to satisfy the various amounts. The appellants claim that said bonds are void; that said district had no authority to issue them; and that the attempt to levy taxes in order to pay the interest thereon is illegal. Upon that ground they resist its collection.

The respondents in the court below filed an answer to the appellants' complaint, setting out all the facts in reference to the issuance of said bonds, and the objects for which they were issued, and the levy of said tax. The appellants filed a demurrer to the said answer, upon the grounds of the illegality of the bonds, which, having been overruled, and a decree entered dismissing the appellants' complaint, the latter has brought this appeal, and desires this court to adjudge the said bonds a nullity. The respondents, on the other hand, claim that the bonds are valid; that the school district issued them in order to raise money to build a school-house, and that the money has been received by the district, and the house built. It will be noticed that the larger part of the tax is unquestionably legal. The one and one third mills for school purposes, and the one half mill for the purpose of making necessary improvements to the school-house block, are unobjectionable, and it appears to this court that the appellants should have paid so much of said tax as is applicable to those purposes before they commenced their suit. It would render it, no doubt, very embarrassing to the affairs of the school district if the court were to interfere and enjoin the collection of the entire tax. If the appellants had paid off the portion admitted to be legal they would have done

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equity before asking its interposition in their behalf. The authorities are not uniform upon the question as to whether or not a plaintiff's complaint should be dismissed in such a case, but this court is of the opinion that that is the better rule. If the appellants are obliged to pay the portion of the tax they claim to be illegal, they will not necessarily lose the amount paid. They can pay it under protest, in order to relieve their property, and if it be illegal can recover it back.

As to whether said bonds are good or valid the court expresses no opinion at this time, as it is not necessary to the disposition of the case under the view entertained.

For the reasons mentioned, the decree appealed from will be affirmed, and the complaint dismissed, without prejudice.

[Filed June 10, 1885.]**R. GLAZE v. WM. McD. LEWIS.**

JUDGMENT OF JUSTICE'S COURT—REVIVOR.—A Justice's Court cannot revive a judgment so as to make it a lien on real estate.

ID.—JURISDICTION.—The Circuit Court has jurisdiction to revive a judgment of a Justice's Court, of which a transcript has been docketed in the judgment docket of the Circuit Court in accordance with section 53 of the Justice's Code.

POLK COUNTY. Defendant appeals. Affirmed.

W. H. Holmes, for Appellant.

J. J. Daly, and *N. L. Butler*, Respondent.

LORD, J.—This is an appeal from the order and judgment of the Circuit Court for Polk County, granting leave to the respondent to issue execution on a docketed judgment of the Justice's Court. The question involved depends for its solution upon the construction and effect to be given to the provisions of our statute in respect to the docketing of a justice's judgment. It is provided by the Justice's Code that "whenever a judgment is given in a Justice's Court in favor of anyone for the sum of ten dollars or more, exclusive of costs or disbursements, the

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party in whose favor such judgment is given may, within one year thereafter, file a certified transcript thereof with the county clerk of the county wherein such judgment is given, and thereupon such clerk shall immediately *docket the same in the judgment docket of the Circuit Court.*" (§ 53, p. 469.) "From the time of docketing a judgment of a Justice's Court, as provided in the last section, the same shall be a lien upon the real property of the defendant, *as if it were a judgment of the Circuit Court wherein it was docketed.*" (§ 54.) And "when a judgment given by a justice of the peace has been duly *docketed in a Circuit Court*, thereafter it must be enforced as a judgment of such Circuit Court." (§ 61.) The appellant contends that the effect of these provisions in providing for the docketing of a justice's judgment is only to create a statutory lien, and not to make such judgment, when docketed, in effect a judgment of the Circuit Court; and as a consequence, he claims that when the lien has expired by lapse of time, the effect of the docketing is gone, and the judgment lapses into its former condition of a justice's judgment, which the Circuit Court is without jurisdiction to revive; but that if such judgment can be revived at all, it must be done by the Justice's Court. It is quite certain that a Justice's Court is without the power to revive a judgment so as to create a lien. Its judgments only have this effect when docketed as prescribed by the sections cited, and if the argument insisted upon is tenable when the lien expires, the judgment cannot be revived.

The provisions of the sections referred to are, in substance, that when such judgment is docketed "the same shall be a lien, etc., as if it were a judgment of such Circuit Court," and "thereafter it must be enforced as a judgment of such Circuit Court." The words "as if it were a judgment of such Circuit Court" seem intended to place such a judgment, when docketed, upon the same footing in all respects, as to the lien creditor, with a judgment of the Circuit Court. And as, "thereafter, it must be enforced as a judgment of such Circuit Court," it would seem, when docketed, to have the same effect as a judgment of the Circuit Court. Under a statute providing that "such judgment

Statement of Facts.

shall have the same effect as a judgment rendered in the Circuit Court, and may in the same manner be enforced," etc., it was held that a transcript properly certified, filed, and docketed, renders the judgment thus transcribed and certified a judgment of a court of record from the time of such filing and docketing; thus changing in some degree its nature, and very materially the rights, powers, and liabilities of the parties to it. (*Jewett v. Bennett*, 3 Mich. 199, 200.) When docketed in the Circuit Court it has the same effect as a judgment rendered in that court, and is to be enforced, canceled, or discharged, and is affected by the Statute of Limitations in the same way. (*Arnold v. Thompson*, 19 Mich. 333; *Davison v. Elliott*, 9 Mich. 252.) It is from the date of the docketing of a judgment of the Circuit Court that it becomes a lien upon the real property of the defendant. (Civ. Code, § 266.) And when a properly certified transcript of a judgment of a Justice's Court is filed and docketed "in the judgment docket of the Circuit Court," the same becomes a lien upon the real property of the defendant from the date of docketing such judgment, and it stands upon the same footing as a judgment of the Circuit Court. When, therefore, it was sought to revive the judgment, the Circuit Court had jurisdiction in the premises, and the application for leave to issue execution was properly made to it.

There was no error, and the judgment must be affirmed.

[Filed June 10, 1885.]

E. R. POPPLETON v. T. B. NELSON ET AL.

USURY—DEGREE OF PROOF.—To establish the defense of usury requires clear and cogent proof. Vague inferences or mere probabilities or conjectures are not sufficient.

YAMHILL COUNTY. Defendants appeal. Affirmed.

Suit to foreclose a mortgage. The answer sets up the following facts, and claims that they render the note and mortgage sued on usurious: That in February, 1874, defendant Nelson

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requested Edgar Poppleton to loan him \$1,300, which he agreed to do for a ten per cent bonus and twelve per cent interest, to which Nelson agreed; that on the 4th day of May, 1874, Nelson applied to said Edgar Poppleton for said money upon said conditions; said Poppleton refused to make said loan unless he pay \$22 accrued interest and \$11 recording and attorneys' fees in addition to said bonus; that on said day Nelson executed said note for the whole of said sums, amounting to \$1,463; that said \$1,300 was the money of Edgar Poppleton and not the money of the plaintiff, and that said note was so executed to plaintiff so that Edgar Poppleton could obtain a greater amount of interest than is allowed by law, being \$163 in excess of legal interest; that said note and mortgage were executed in the plaintiff's name by collusion and fraud between the plaintiff and said Edgar Poppleton, in order to avoid and circumvent the statute of usury; that plaintiff never was the true owner of said money loaned or the note or mortgage given to secure the same, but that they were and are the property of Edgar Poppleton; that on or about July 18, 1874, said note and mortgage were transferred by plaintiff to Edgar Poppleton by indorsement of said note; that by the terms of said mortgage defendant Nelson agreed to pay five per cent additional as attorney's fees; that said Nelson covenanted therein to pay all assessments of taxes levied upon the premises described in the mortgage, or upon said mortgage, or the money secured thereby.

James McCain, and W. D. Fenton, for Respondent.

A. M. Laughary, for Appellants.

LORD, J.—This is a suit in equity to foreclose a mortgage. The defense is usury. This is the main question involved, and is one of fact, which needs to be proved by clear and satisfactory evidence. As the defense of usury involves a forfeiture, it is considered as an unconscionable defense, and a strict one. To establish such a defense the court requires clear and cogent proof, and will not accept vague inferences, or mere probabilities, or resort to conjectures, to aid the defense. The burden of

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proof is on the defense, and he must sustain his allegations by a clear preponderance of evidence. "He is impeaching his own solemn obligation under seal, and must establish the facts necessary to constitute it, beyond reasonable doubt. It is not sufficient to show an even balance of testimony; there must be a clear preponderance. Usury is a defense not favored in equity; the old consequences, the forfeiture of the whole debt, was so severe a penalty that it was considered unconscientious." (Zabriskie, Chancellor, in *Conover v. Van Mater*, 18 N. J. Eq. 487.) "The burden of proof," said Depue, J., "is on the defense, and the defense cannot be supported by probabilities or suspicions, however strong. If allowed to prevail, it must be supported by such preponderance of evidence as establishes the truth of the allegations on which it depends beyond a reasonable doubt." (*Taylor v. Morris*, 22 N. J. Eq. 612; *Brolasky v. Miller*, 8 N. J. Eq. 789; *New Jersey Pat. T. Co. v. Turner*, 14 N. J. Eq. 326.) And again he says: "If the defense of usury should ever be sustained upon the uncorroborated testimony of the party by whom the security was made, the testimony should be in all respects unexceptionable." (See also 1 Jones Mortg. § 643; Tyler Usury, 122.) These references are sufficient to show how the defense of usury is regarded in equity, and the strictness of proof required to support it. As by our statute such a defense involves by way of penalty the loss of the debt, the proof of it ought certainly to be clear and satisfactory. After careful examination of the evidence, we are satisfied the charge of usury is not sustained. There is no clear and direct proof, and the inferences and conjectures sought to be drawn from some of the facts are too unreliable on which to base a conclusion.

The decree of the court below must be affirmed.

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[Filed June 11, 1885.]

STATE OF OREGON v. LEE HALE.

CRIMINAL LAW—EVIDENCE—PRESUMPTION—POSSESSION OF STOLEN PROPERTY.—

The only presumption of guilt arising from the possession of property recently stolen is one of fact and not of law.

UMATILLA COUNTY. Defendant appeals. Reversed and new trial ordered.

Wm. Ramsey, for Appellant.

Morton D. Clifford, District Attorney, and *W. H. Holmes*, for Respondent.

LORD, J.—The defendant was indicted for the larceny of certain cattle, tried and convicted, and from the judgment of conviction brings this appeal to this court. There are numerous assignments of error, but after an attentive examination of them we are satisfied there is but one that is material and error. The court instructed the jury that “when property recently stolen is found in the possession of any person, such possession raises a presumption of guilt, and unless he shows that he came honestly into the possession of said property the law will presume that he stole the same.” The objection to this instruction is that the weight to be given to fact or circumstance is, under our statute, to be left to the jury; that the court is not authorized to pass upon the weight to be given to any circumstance, or to direct the jury in reference thereto. It is often said that the recent possession of stolen property by the prisoner, unexplained, raises the presumption that he is the thief, and that this presumption shifts the burden from the State to the prisoner. But the presumption raised by such circumstances is one of fact, from which the jury may infer guilt. There is no legal presumption of guilt from the recent possession of stolen property.

In *Conkright v. People*, 35 Ill. 204, it was held error to instruct a jury, upon a trial for larceny, that possession of stolen property soon after it is stolen is of itself *prima facie* evidence of theft by the possessor, and the burden of proving his posses-

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Points decided.

sion to have been honest is there thrown upon him. The question is undoubtedly a vexatious one, and upon it, as Mr. Bishop says, "all sorts of utterances are to be found in the books." (2 Bish. Crim. Proc. § 740.) But we regard it as a question of fact and not of law, to be submitted to the jury, and for them to determine whether the defendant is the guilty party or not. In *Curtis v. State*, 6 Cold. 9, the court say: "The possession of such a chattel as a horse, two months after the theft, is a circumstance to be considered by the jury; but it does not, even unexplained, raise a conclusive presumption of the prisoner's guilt. The jury may, and should, give it proper thought as evidence; but the matter is for them, and they are not bound in such case to convict the prisoner unless they are, upon the whole evidence, satisfied of his guilt." In *State v. Hodge*, 50 N. H. 510, this whole subject, and the authorities upon it, is ably and thoroughly reviewed, and the result there reached is in conformity with our views.

We think the instruction was error. The judgment must be reversed, and a new trial ordered.

[Filed June 10, 1885.]

ANN R. WILSON AND MARY E. WAKEMAN v.
NANCY WELCH ET AL.

RIPARIAN RIGHTS.—The rights of a shore-owner upon tide water or a navigable stream are not derived from the State, but are held in subordination to the rights of the public.

ID.—TIDE LAND ACT.—*Quære*, whether a shore-owner purchasing abutting tide lands under the Act of October 28, 1872, and amendments, gains any greater rights than he had before.

ID.—RIGHT TO PURCHASE.—The right given to shore-owners by said act was a mere option to purchase, and does not constitute an equitable title.

CLATSOP COUNTY. Defendants appeal. Affirmed without costs.

The facts are stated in the opinion.

Sidney Dell, for Respondents.

E. C. Bronaugh, for Appellants.

XII. OREG.—23.

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11*	238
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THAYER, J.—This appeal is from a decree rendered in a suit commenced by the respondents against the appellants, to declare a trust in favor of the former in certain tide lands formerly conveyed by the State of Oregon to James Welch, ancestor of the appellants. The respondents alleged in their complaint in the suit that said James Welch procured said deed from the board of commissioners for the sale of school lands, etc., on the 18th day of September, 1876; that in his application for the purchase thereof he fraudulently represented that he was the owner of block 11, in the town of Astoria, which abuts upon said tide land, when in truth said block did not belong to him; that he and one Shively had, by deed bearing date June 3, 1846, conveyed it to John Wilson, ancestor of the respondents, and that the latter owned it at the time said application was made, and that no notice of any kind was given to him, or to anyone, by said Welch or said board, nor by any person, of the application; that both James Welch and John Wilson had since died, and that the appellants and respondents are their respective representatives and successors in interest, the respondent Ann R. Wilson being widow of the said John Wilson, and the said Mary E. Wakeman, a daughter; that the former owns a dower right in said block 11, and the latter owns the remainder.

The respondents further alleged that on August 29, 1877, they commenced an action against the appellants to recover the possession of said block 11, and that on March 27, 1878, they recovered a judgment against them, whereby it was adjudged that said John Wilson was the owner in fee of said block by virtue of said deed of June 3, 1846, until his death, and that they then became the owners thereof as mentioned, and entitled to the possession. They alleged, also, that they did not know the exact amount of purchase price paid by James Welch to the State of Oregon for said tide lands, but offered to pay the same when ascertained by the court. The appellants denied that said James Welch procured the deed from the State to the tide land by the representation alleged; denied that said block 11 abutted or fronted on the shore of the Columbia River; claimed that on said 30th day of June, 1846, it was above ordinary high-water

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mark, but that since said time the water had gradually encroached upon the bank of the river, upon the north side of said block, and that the line of ordinary high tide had moved south until it then reached the north boundary thereof; that by said deed the said block thereby intended to be conveyed is bounded by metes and bounds, and the number and size of the lots expressly given, and that the deed was made solely with reference to said parcel of land as a platted block, and the parties intended it should not extend further on the north than the street known as "Wall Street," but which was by mistake designated in said deed as "Water Street," which lies in front of the block, and between it and said tide land; that in front of the block is a strip of land included within said street which was above ordinary high tide, and in front of the strip and of the street was a tide flat, extending for a distance of 700 feet, susceptible of being easily reclaimed, which flat, at the date of the purchase of the block by said John Wilson, was of great value; that from the north side of the flat it was 600 feet to the ship channel of the Columbia River, and that said space was valuable for wharfage purposes, and at the date of the deed was worth several thousand dollars; that it had been duly platted and laid off into lots and blocks, with streets extending through the same, which fact said Wilson well knew at the time he purchased block 11; that about 1845 said James Welch bought of said Shively all his right and property as riparian proprietor of the tide land in controversy; that the appellants had succeeded to his rights, and that they and said James Welch, for more than thirty years, had paid taxes on the land as their private property, and had paid \$1,000 for street improvements.

These facts were in the main denied by the respondents in their reply. The proofs in the case show that said Shively, some time prior to the year 1846, settled upon a tract of land including said block 11; that he conveyed an undivided half of it to said James Welch; that they surveyed and laid off a part of it into lots and blocks; that Welch gave to Shively a power of attorney; that said Shively executed the deed for himself and said Welch to the said John Wilson, of June 3, 1846, to said

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block 11; that after the passage of the Donation Act of September 27, 1850, the said Shively, after taking back a deed from Welch of the undivided half interest, entered the said tract of land as a donation claim, and subsequently, and in the year 1860, obtained a patent to it; that after his entry and compliance with the provisions of that act, said Shively reconveyed to said Welch a portion of the claim in severalty, which conveyance included said block 11. The deed to Wilson of June 3, 1846, purports to convey a parcel of land in the town of Astoria, described as being a part of the settlement rights of said Shively, on which he had laid out and surveyed said town, and which premises consisted of lots numbered from 1 to 12, inclusive, forming block 11, which it describes as being bounded north by Water Street, east by Spence Street, south by West First Street, and west by Pine Street, which lots it states were each fifty feet front by one hundred and forty-two and a half feet back; reference being had to the plat of said town of Astoria, so laid out as before mentioned, which plat had then been lithographed by E. & J. Ihltawa, of St. Louis, Missouri. The deed also contains a covenant to have said plat recorded as soon as there should be an office provided by law for that purpose. It also contains a covenant that the grantors will forever warrant and defend the fee-simple title to the premises, free from the claims of all persons whatever; also that the grantors, their heirs, executors, and administrators will, at the expense of the grantee, his heirs or assigns, make a new and further deed, if the same should be required to vest a fee-simple title, when they, or either of them, shall demand the same. The deed was not acknowledged or proved so as to entitle the same to record until March, 1876, and was recorded in the office of the clerk of the county of Clatsop in April of that year.

It further appeared in proof that said James Welch did base his right to purchase said tide land, when he made said application to purchase, upon the ground that he was the owner of said block 11, upon which it abutted at that time; and it further appears that at said time, and for a long time prior thereto, he had claimed to be the owner thereof, and that the appellants

continued to claim such ownership until the affirmance of the judgment by this court recovered against them as before mentioned. Proof was also given tending to show that there had been a narrow strip of high land adjoining said block 11 on the north, within the street called "Water Street," but that it had been carried away by the action of the water; but at what date it disappeared is not shown.

The land in controversy includes less than half an acre. It was purchased by said James Welch of said board of commissioners, under the provisions of the legislative assembly of the State to provide for the sale of tide and overflowed lands on the seashore and coast, approved October 28, 1872, as amended in 1874. That act provides that the owner of any land abutting, fronting, or bounded by the shore of any bay, harbor, or inlet on the sea coast, shall have the right to purchase from the State all the tide land belonging to the State in front of such owner or owners, subject to certain provisos which allow the owner of improvements upon such tide lands to purchase the lands so improved for a certain period, and also allow outside parties to become such purchasers in case the owner or owners of the high land fail to make application for the purchase of the same for three years; but in the latter case, the board of commissioners for the sale of such lands must give the owner or owners of the high land, having the preference in the purchase thereof, notice of such application to purchase the same, who thereupon have sixty days after the notice is given in which to make application to purchase it. It was conceded in this case that the said board of commissioners gave no such notice to said John Wilson or the respondents.

The appellants' counsel claims that if a strip of high land did exist north of block 11 on June 3, 1846, so that the wharf privileges remained in Shively and Welch after the execution and delivery of the deed of that date, such right and, as he claims, the consequent right to purchase the tide lands in front of that strip, would not be divested out of Welch and vested in Wilson by the act of the washing away of such strip of land before the passage of the said act. He also claims that the effect of the

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descriptive part of said deed, in which the lots in said block are conveyed by number and dimension, respectively, and then the block bounded specifically by streets between which it lies, is sufficient and conclusive evidence that it was the intention of the grantors to limit the grant to the land contained within the exterior boundary lines of the block, and to reserve the wharf rights and privileges between the north line of said Water Street and the ship channel. The decision of this court in *Wilson v. Shiveley*, 11 Oreg. 215, at the March term, 1884, was adverse to the points raised by the counsel; still, as I view the question, they are very important matters. A shore-owner upon tide waters, or upon a navigable stream, possesses rights which, of late, are conceded to be property. (*Yates v. Milwaukee*, 10 Wall. 497.) They are not rights, as has often been supposed, that were derived from the State, though held and enjoyed in subordination to the rights of the public. (*Dalaplaine v. Chicago & N. W. Ry. Co.* 42 Wis. 214; *Lorman v. Benson*, 8 Mich. 18.)

The embarrassing feature of this subject has arisen out of a misunderstanding of the nature of the State's ownership of land between high and low water upon navigable streams. It has been spoken of as an ownership in fee, and an erroneous impression has been conveyed. The State does own the channel of the navigable rivers within its boundaries, and the shore of its bays, harbors, and inlets between high and low water, but its ownership is a trust for the public. It has no such proprietorship in them as it has in its property and public buildings. It cannot sell them so as to deprive the public of their enjoyment (*Providence Steam Engine Co. v. Providence & S. Steamship Co.* 12 R. I. 348); nor can it take away riparian rights, except for public use, and by giving just compensation. (Gould Waters, § 150.) The New York courts have taken a different view, and which has been followed by an Iowa decision (*Tomlin v. Dubuque etc. R. Co.* 32 Iowa, 106); but it is repudiated by the federal and most of the State tribunals. If, then, the riparian rights referred to, such as wharfage privileges, are property, they may be sold, or reserved to the owner of high land upon which the tide land abuts. There is no reservation in terms in the deed of June 3, 1846; but if the

riparian rights belonging to Shively and Welch were not conveyed, which was the case if there was a strip of high land between said block 11 and the tide land in question not conveyed by the deed, they necessarily remained in them, and I do not see how they could be divested out of them without their consent, unless such rights are held to be inseparable from the upland. But that would not be consistent with the holding in *Parker v. Rogers*, 8 Oreg. 189.

Too much importance, I apprehend, has been attached to the tide-land act before referred to. I seriously doubt whether that act confers any new right upon the shore-owner in such cases, although he has purchased the land in front of him in accordance with its terms. The title he obtains is subordinate to the public right of passage and navigation, and he had the same wharfage privileges before as afterwards, and the right to protect his uplands from the encroachments of the sea. According to Hale there are three sorts of rights in ports and shores: *First*, the *jus privatum*, or right of property or franchise; *second*, the *jus publicum*, or public right of passage and navigation; and *third*, the *jus regium*, or governmental right. The State could not, by any sale of the shore of a body of water below high tide, deprive itself of the latter right; nor, as before suggested, could it thereby deprive the public of the right of passage or navigation. What, then, can such a sale of that character of tide land amount to? I doubt very much whether a sale in such a case could be made to an outside party that would deprive the riparian owner of any right to the enjoyment of the land.

It was held in the case of *People v. Cowell*, 60 Cal. 400, that lands within the flow of ordinary tides, the cost of reclaiming which would greatly exceed their value when reclaimed for any agricultural purpose, were not acquirable under a statute authorizing a sale of reclaimable lands. The State might authorize a sale, doubtless, of tide flats, and the purchaser have the right to reclaim them and devote them to private use, where no right of public passage or navigation is infringed; but to attempt to sell a part of the channel of a navigable stream below any ordinary stage of high water, occasioned either by tides or freshets,

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is absurd. But if I am mistaken in this view, and the State has an absolute ownership in such cases, as some of the authorities would seem to indicate, how can the respondents maintain their suit to declare a trust in their favor in the land in controversy? They, nor their ancestors, never owned it legally nor equitably. Conceding their ownership of block 11, and that the tide land abutted upon it, that certainly gave them no ownership of the latter, if the title was in the State. The Act of 1872 graciously gave them, in that case, a preference in the purchase, but it prescribed conditions upon which the purchase can only be made. The respondents do not allege or show that they have ever attempted to comply with these conditions. It may be inferred that they consider the purchase by Welch, based upon his claim to be the owner of said block 11, made it unnecessary for them to apply; but how does the court know that they would have purchased the land if Welch had not? The Act provides for a regular sale of such lands. Section 3 says that the applicant shall, with his application, present to the officer or officers who are or shall be authorized to sell such lands, evidence of his title to land which abuts, etc., upon such tide land; and section 4 says that the value of such tide lands shall be appraised at a certain sum per acre, which shall not be less than \$1.25 for each acre of such land; provided, that the board having in charge the sale of such lands shall have power to set aside any appraisement on evidence taken of the true value of the same, and shall make another and true appraisement, based on such evidence.

The act did not contemplate that the applicant should get the land for less than its true value in any case, and the legal privilege in favor of the shore-owner was merely to buy the land for what it was actually worth. In such cases many shore-owners might not be inclined to attempt to make such purchase. Whether the respondents would have been so disposed is left entirely to conjecture; and yet they now claim that Welch's title should inure to their benefit. I can readily understand that where one has the equitable title to real property, the legal title to which is outstanding, and another person wrongfully buys in

such legal title, a court of equity could decree that the legal title so purchased should inure to the benefit of the equitable owner. To grant such relief, however, in favor of one who never had the equitable title, who had merely an option to purchase the property upon such terms as might be agreed upon with the owner, and who had never proposed to make the purchase, or indicated any intention of that character, would be carrying the doctrine to an unjustifiable extent. I think the respondent's remedy in this case, under the theory that the State had the absolute title to the property in question, and had conveyed it to James Welch, was to have the State commence an action for the purpose of vacating the patent or deed executed to him, as provided in section 355 of the Civil Code; and when a judgment has been obtained annulling it, make their application for the purchase of the land.

But as before suggested, I do not think the sale affected the rights of the owners of the land upon which the tide land abutted. The main question in the case, as I regard it, is as to whom these rights belonged. If, by the terms of the deed of June 3, 1846, from Shively and Welch to John Wilson, they were reserved to the former, then they are rightfully in the appellants; but if no such reservation was made in that instrument, then the respondents succeeded to them whenever they became shore-owners. The rights which attached to the narrow strip, which counsel for the appellants claims was not conveyed by the deed, and which existed as a mere incident of that parcel of land, were lost when it was washed away. The courts have usually held, where the question has arisen, that where a lot or block is bounded in a deed by a street, the deed operates to convey the land to the center of the street. Under such a construction it is quite evident that the deed of June 3, 1846, conveyed the high land adjacent to and on the north side of said block 11. I am informed that this court has so ruled, and I must consider that ruling as decisive of the question. But if the deed referred to showed an evident intent to reserve the said riparian rights to the grantors, they and their successors should be adjudged the owners thereof. In *Codman v. Winslow*, 10 Mass.

Points decided.

149, it was held that a deed to a tract of land bounded on a street or way would not be construed as extending across the street or way so as to include other lands and flats below high-water mark. Such a construction might have been applied in this case if the said grantors had owned the land below high-water mark. But where the right to the latter land is only incidental to the ownership of the high land, I think it would not be separated therefrom without a special reservation in such grant, and I am unable to discover any such reservation in the deed of June 3, 1846. Besides, Welch himself does not seem to have supposed that his right to purchase from the State arose out of any such reservation, as he based it upon his alleged ownership of block 11. I am of the opinion, therefore, that the equities are with the respondents, and that they should have a decree enjoining the appellants from interfering with their riparian rights in front of said block under and by virtue of said deed from the State, which is the extent of the relief I think they are entitled to, and that neither party should recover costs.

WALDO, C. J., and LORD, J., concur in the result, but upon different grounds.

[Filed June 10, 1885.]

Y. A. SMITH v. E. D. SHATTUCK, ADM.

EVIDENCE. — It is ordinarily proper for courts *at nisi prius* to permit documents to be offered in evidence provisionally, and afterwards to instruct the jury as to their effect.

STATUTE OF LIMITATIONS—COLOR OF TITLE—TAX DEED. — Where a defendant claims title by virtue of the Statute of Limitations, and offers in evidence a tax deed to himself, such deed in connection with possession is competent, even if its description of the premises is imperfect, to show that the defendant was holding under color of title.

VERDICT—POWER OF COURT OVER. — The court has no right to direct the jury to find a designated verdict. Its authority is limited to stating to them "all matters of law which it thought necessary for their information in giving their verdict."

MULTNOMAH COUNTY. Plaintiff appeals. Affirmed.

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Argument for Appellant.

The facts are stated in the opinion.

Killin & Moreland, for Appellant.

The only *title* under which the respondent claimed is an old tax deed to I. B. Smith, which had no description of land except "thirty-seven and one half acres of land in Section 11, T. 1 S. of R. 1 E., known as Smith's farm, in Multnomah County, State of Oregon." Neither the assessment roll, delinquent list, nor sheriff's return, upon which this deed was based, had in them the words "*known as Smith's farm.*" The evidence should show that the land had acquired a name—a proper name. (1 Greenl. Ev. p. 426, n.; 2 Wharton Ev. § 943; Burroughs Tax. 204, 105; Blackwell Tax Title, 127–133, 379, n. a; 2 Desty Tax. 921.) Jurisdictional facts are not cured by three-year statute. (Code, 768, 771; Burroughs Tax. 340, 341.) Illegal or insufficient assessment a radical defect not cured by five years' prescription. (*Person v. O'Neal*, 32 La. An. 228; *Woolfolk v. Fonbene*, 15 La. An. 15; *Thibodaux v. Keller*, 29 La. An. 510.) A special Statute of Limitation for titles under tax deeds can be pleaded only when defendant could recover on strength of title. (*Lockridge v. Daggett*, 54 Iowa, 335; S. C. 47 Iowa, 679; *Barrett v. Love*, 48 Iowa, 103.) In a tax deed there is no intention of parties to be proved *aliunde*; the sale is hostile to the owner. The description must be certain of itself, and not require evidence *aliunde* to render it certain. (Blackwell Tax Title, pp. 124, 152; *Tallman v. White*, 2 N. Y. 70.) Description, thirty-seven and one third acres in section 11, T. 1 S. of R. 1 E, in assessment roll, delinquent list, and sheriff's return, is void for uncertainty. (*People v. Cone*, 48 Cal. 429; *Keane v. Cannovan*, 21 Cal. 301; *People v. Andreas Pico*, 20 Cal. 596; *Kelsey v. Abbott*, 13 Cal. 609; *Griffin v. Creppin*, 60 Me. 270; *Gardner v. Brown*, 1 Humph. 354; *Ronkendorff v. Taylor*, 4 Peters, 349–363; *Roberts v. Deeds*, 57 Iowa, 320; *Shackleford v. Bailey*, 35 Ill. 387; *Yandell v. Pugh*, 53 Miss. 296.) If the description of the tract sold is general and void for uncertainty, the defect cannot be cured by inserting a proper description in the certificate of purchase or collector's deed. (*Roberts v. Chan Tin Ben*,

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23 Cal. 260-267; *Burlew v. Quarrier*, 16 W. Va. 109; *Henderson v. Starritt*, 4 Sneed, 470.)

James K. Kelly, for Respondent

In listing the land (for taxation) it must be described with particularity sufficient to afford the owner the means of identification, and not to mislead him. A description that would be sufficient in a conveyance between individuals would generally be sufficient here. (Cooley Tax. 382, 383; *Kelly v. Herrall*, U. S. Dis. Ct. for Ore. June, 1884.) The description in the tax deed offered in evidence by defendant is sufficient. (*Bank of Mo. v. Bates*, 17 Mo. 583.) A tax deed, informal and defective in substance, is admissible to show color of title in the defendant to bring him within the protection of the Statutes of Limitation. (*Edgerton v. Bird*, 6 Wis. 527; *Sprecker v. Wakeley*, 11 Wis. 432; *Lindsay v. Fay*, 25 Wis. 460; *Leffingwell v. Warren*, 2 Black, 599; *Pillow v. Roberts*, 13 How. 477; *Wright v. Mattison*, 18 How. 50; Cooley Tax. 382.) The special finding of the jury, coupled with the tax deed and the deed of Gideon Tibbetts and wife to I. B. Smith, dated March 17, 1874, show that he was holding the premises adversely under color of title for more than ten years. "The act of taking possession if otherwise unexplained will be referable to the paper title, and understood as making a claim under it." (*Wright v. Mattison*, *supra*; *Dillingham v. Brown*, 38 Ala. 313; *Finlay v. Cook*, 54 Barb. 23; *Chapman v. Templeton*, 53 Mo. 463.)

THAYER, J.—This appeal is from a judgment of the Circuit Court for the county of Multnomah. The appellant commenced an action in said court to recover the possession of certain real property, consisting of a tract of thirty-seven and one half acres of land situated in said county of Multnomah. The complaint is in the usual form to recover the possession of real property. The respondent interposed several defenses, viz.:—

First. That the land was owned by one I. B. Smith, and in his possession at the time of his death, September 3, 1882, and that the respondent was the administrator of the said Smith.

Second. That on the 13th day of June, 1866, the land was sold by the sheriff of Multnomah County for taxes due from the appellant, which were delinquent, and was purchased at said tax sale by said I. B. Smith; that no redemption thereof having been had, a deed was duly executed by the sheriff of said county to the said I. B. Smith, on the 3d day of July, 1868; that said deed was duly recorded in the office of the clerk of said county, on the 2d day of November, 1870, since which time the said I. B. Smith was in the actual possession of said tract of land until the time of his death; and that no action, suit, or proceeding for the recovery of said land was commenced within three years from the said 2d day of November, 1870, the time of recording the tax deed. *Third.* That neither the appellant, his ancestor, predecessor, or grantor, was seized or possessed of the premises within ten years prior to the 3d day of September, 1882, when said I. B. Smith held and possessed the same adversely to the pretended title of the appellant for more than ten years before the time of his death, under a claim of title in fee simple.

The appellant filed a reply, in which he denied the several defenses set up by the respondent, and the issues so formed were tried by the court and a jury duly impaneled. The appellant, upon the trial, gave in evidence a deed executed by Gideon Tibbetts and wife to himself, dated March, 24, 1858, of the land in controversy; also a patent from the United States to the said Gideon Tibbetts and wife, bearing date January 31, 1873, of a larger tract of land, and which included the land in dispute. The said deed to appellant contains full covenants of assurance, and the patent was issued under the Oregon donation law. The premises in question are a part of the said donation claim that inured under the said law to Mrs. Tibbetts. The respondent upon his part gave in evidence the tax deed alleged in his answer. When it was offered in evidence, counsel objected to its introduction upon the grounds that it was incompetent and immaterial, as it contained no sufficient description of the land. The description in the deed is as follows: "Thirty-seven and one half acres of land in section 11, T. 1 S., R. 1 E., known as

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'Smith's farm,' in Multnomah County, State of Oregon." The deed also contained a recital as follows: "The said property having been duly assessed for the fiscal year, 1865, to the said Y. A. Smith." When the objection was made to the introduction of this deed, the respondent's counsel stated to the court that he would show that in the month of June, 1866, said land was known as Smith's farm in the neighborhood where it is situated, and thereupon the court overruled the objection, and said deed was read in evidence to the jury.

Gideon Tibbetts, having been called as a witness, testified that he was very well acquainted with the land; that it was a part of the donation land claim of himself and wife; that his claim was in sections 10, 11, and 12, mostly in section 11, in the township and range aforesaid. The witness was then asked if he knew where a tract of land lies, described as "thirty-seven and one half acres of land in section 11, T. 1 S., R. 1 E., known as 'Smith's farm'"; to which he answered: "I know of a tract of that size that Smith pretended to own; he paid me for it; we always called it Mr. Smith's land, that piece of ground." Said witness, in answer to another question asked by the respondent's counsel, testified: "This piece of land was known there as Smith's land, referring to June 6, 1866, and it is known to-day, I believe, as that. I have never heard of any other tract of land in that section that has been known as Smith's land, or as the Smith land." This evidence was taken against the objection of appellant's counsel as being incompetent and immaterial; and there was no other evidence tending to show that the premises in controversy were in 1866, or at any other time, known as Smith's farm. Said witness also testified that as much as fifteen years ago I. B. Smith, deceased, occupied a house which had been moved on the land in controversy for a school-house, but never used for such purpose; that I. B. Smith, deceased, slept in it and cooked there; and that some wood-choppers, cutting wood on the land in his employ, for a time slept there, and cooked their meals in it. He also testified that for the last five or six years of his life I. B. Smith resided on the land in controversy, in a small house built by himself, and had

a small piece under cultivation. Another witness, John Campbell, testified that in 1878 or 1879, he, at the request of I. B. Smith, surveyed the land in controversy for him, and that he after that time, and until his death, resided upon it; and there was no other evidence tending to show adverse possession of the land in controversy by I. B. Smith. Respondent then offered in evidence a deed of Gideon Tibbetts and wife to Isaac B. Smith, dated the 17th day of March, 1874, for the land in controversy, to the introduction of which the appellant objected, because it was incompetent and irrelevant, which objection the court overruled, and allowed the respondent to read the same to the jury; to which ruling of the court the appellant then excepted. The respondent then rested, whereupon the appellant moved the court to strike out from the evidence the tax deed offered in evidence by the respondent, and to withdraw it from the jury; which motion the court overruled, and appellant excepted.

The respondent having rested, the appellant gave in evidence a certified copy of the assessment roll of said county of Multnomah for the assessment of taxes for the year 1865, and also a certified copy of the notice of said sale of said land for delinquent taxes, and then requested the court to direct the jury to find a verdict for the appellant, which the court refused. The said assessment roll and notice of sale contained the same description of the premises assessed and sold as the tax deed, except that the words, "known as Smith's farm," were not included therein. And thereupon the court proceeded to charge the jury; and among other instructions, submitted the following:—

"If you find the fact to be that there was in section 11, T. 1 S., R. 1 E., and on the donation land claim of Gideon Tibbetts, a parcel of land conforming in size and shape to the land in controversy, and known in the year 1866, about July of that year, as 'Smith's farm,' and that there was no other similar piece of land in that section that was so known, then your verdict should be for defendant."

To the giving of this instruction the appellant then excepted, because there was no evidence tending to show that in 1866, or

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at any other time, the land in controversy had been known as "Smith's farm." The court then, at the request of the respondent, submitted to the jury the special question: "How long, if for any time, was Isaac B. Smith, deceased, in the actual possession and a resident upon the land in controversy?" and asked the jury to find a special verdict upon the said question; to the submission of which special finding the appellant objected, because it was incompetent and immaterial, and because there was no evidence tending to show that there had been any adverse possession of said lands before the commencement of this action. A general verdict was rendered for the defendant, and the special finding was answered: "Since 1869." The appellant filed a motion to set aside the general verdict, and also to set aside the special verdict, both of which were refused by the court, and the judgment appealed from was entered.

The questions presented for the consideration of this court are, the admission in evidence of the tax deed, and the deed from Tibbetts and wife of I. B. Smith, of March 17, 1874; the refusal of the court to strike out from the evidence the tax deed; the refusal to direct a verdict for the appellant; giving the instruction excepted to by the appellant; submitting the special matter to the jury; and in refusing the motion to set aside the special and general verdicts. There was certainly no error in submitting the two deeds in evidence. They were relevant and pertinent to the issues, and the court should not have been compelled to stop at that stage of the proceeding to consider their effect, whatever might have been its final conclusion as to their materiality. The respondent had in his answer alleged title to the premises in I. B. Smith, and set up as another defense the Statute of Limitations. He had a right, therefore, to give in evidence any proof that tended to establish either defense. It is the usual practice of courts at *nisi prius* to receive such proofs in the first instance, and afterwards instruct the jury as to their effect. This is the more prudent course, and an appellate court would not be justified in reversing a judgment upon such ground, unless it could plainly perceive that the rights of the opposite party had been prejudiced in consequence thereof. Nor could

the Circuit Court have properly stricken out from the evidence the said tax deed, even if its description of the premises were imperfect. It was still admissible to show that said I. B. Smith was holding under color of title. It was competent evidence, in connection with proof of possession, in order to establish the defense of the Statute of Limitations. (*Pillow v. Roberts* 13 How. 477; *Wright v. Mattison*, 18 How. 50.)

The request of the appellant that the court direct a verdict in his favor was properly overruled. The court had no such power over the jury as that. It had no right except to state to them "all matters of law which it thought necessary for their information in giving their verdict." It had no authority to present the facts in the case, and was required to inform the jury that they were the exclusive judges of all questions of fact. (Civ. Code, § 198.) The appellant had a right, when the evidence was closed, to submit in distinct and concise propositions the conclusions of fact which he claimed to have been established, or the conclusions of law which he desired to be adjudged, or both. The conclusions of law would, of course, have been decided by the court; but the conclusions of fact would have had to have been submitted to the jury. (Civ. Code, §§ 237, 238, 239.) The court had the right, undoubtedly, to inform the jury as to what it was necessary for the respondent to prove, in order to establish his defenses; and if there were no evidence, or it were not sufficient to make out any of the defenses, and the jury decided wrong, the court should have set their verdict aside. A jury may err in their decision, may conclude that a party has maintained a defense when he has not, but the law does not presume they will do so any more than it will presume that a court will mistake the law. In the event they do, however, it can be corrected without the court having to get into the jury-box. The province of a jury is as certain and sacred under our law as that of the court, and the functions of the former can no more be usurped than those of the latter. The appellants could not have expected the court would set aside the verdict, unless it concluded that its charge to the jury, before referred to, was erroneous. The court told the jury, in the charge, that if they

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found that there was in said section, township, and range, and in the donation claim of said Tibbetts, a parcel of land conformable to that in controversy, and known as "Smith's farm," at the time referred to by the court, and that there was no similar piece of land in that section so known, their verdict should be for the respondent; and as the jury returned a verdict for the respondent, it is quite probable they found such fact. The court could not, in view of that instruction, have consistently set the verdict aside. Nor can this court conclude that there was error in denying said motion, without determining that there was error in the said instruction.

The question submitted by the court for the special finding of the jury was of very little importance. The answer returned by them was entirely inconclusive in itself to establish the defense of the Statute of Limitations. The length of time Isaac B. Smith was in the actual possession of and a resident upon the land in controversy was entirely immaterial, unless he was holding during the time adversely to the appellant. It was claimed by the respondent's counsel, upon the argument, that the fact that Isaac B. Smith purchased the premises at the tax sale, and put the deed upon record, was evidence that his holding was as an owner. However that may be, neither the question nor finding of the jury in answer thereto injured the appellant, and is of no advantage to the respondent on the appeal, as it does not appear that the general verdict was rendered upon the defense that the appellant had not been seized or possessed of the premises within the period of ten years. It is as likely to have been rendered under the instruction as to the effect of the tax deed, or upon the three-years limitation, or upon the other defense. The consequence, therefore, is that the respondent must maintain the correctness of the said instruction, to prevent a reversal of the judgment. And if it be correct, then the appellant's other points fall to the ground, as that is the sum of all the alleged errors in the case.

After a very thorough consideration of the instruction relating to the effect of said tax deed, in case the jury found that there was a parcel of land answering to the description contained in it, we

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have concluded that the Circuit Court properly gave it. The evidence to support such a finding was very slight and unsatisfactory; but when there is any evidence, however meager, calculated to prove any fact in a case, it becomes the province of the jury to weigh it and determine its effect; and whatever may be our view as to the correctness of the determination, we have no right, under our system of procedure, to reverse a judgment in consequence of an instruction to the jury that if they find a certain fact they should find a verdict in a certain way, when the fact would authorize such a finding or conclusion, and there is evidence in the case which fairly tends to support it. The description in the tax deed is sufficiently certain upon its face, that is, it was capable of being made certain, if the land therein described could be ascertained; and the evidence upon that point, hereinbefore referred to, showed, in the opinion of the court, a case sufficient to be submitted to the jury.

The counsel for the appellant contended, upon the argument, that the land in question had no such notoriety as would justify any reference to it by name as descriptive of it. It is probably true that it was not extensively known by any name. But it consisted of thirty-seven and one half acres situated in the city of East Portland, was a part of a certain donation land claim, several deeds to it had been executed, the said I. B. Smith had moved onto it some fifteen years previous, had since then had it surveyed, and for five or six years prior to his death had lived upon and cultivated it. There could have been, under the circumstances, no mistake as to the identity of the land assessed and sold for taxes. The people in that vicinity unquestionably were acquainted with it, and well knew, as a matter of fact, what piece of land was intended from the advertisement of the delinquent tax-list and the sheriff's deed. The case is by no means free from doubt, but it comes here upon the finding of a jury upon the questions involved, and after the court who tried the case has refused to set the finding aside.

The judgment will therefore be affirmed.

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[Filed June 10, 1885.]

J. A. W. SCOGGIN v. MAHLON HALL.

INTIMIDATION OF WITNESSES—REMEDY—APPEAL.—The intimidation of a party's witnesses, by the occurrence of a casual broil in a Justice's Court during the trial, does not justify him in withdrawing from the trial and afterward commencing a suit to impeach the judgment in such action. He has an adequate remedy by appeal to the Circuit Court.

WASCO COUNTY. Plaintiff appeals. Affirmed.

The facts are stated in the opinion.

Hill & Mays, for Appellant.

Watkins & Bird, for Respondent.

THAYER, J.—This appeal is from the Circuit Court for the county of Wasco. The respondent commenced an action in a Justice's Court in that county against the appellant to recover a colt, which was about eight months old, and damages for its detention. The colt was alleged to be of the value of thirty-five dollars. The parties met before the justice and engaged in the trial of the case. It seems that a row occurred between some of the witnesses, which interrupted the proceedings of the trial. The justice, in order to get matters quiet, adjourned the trial over to the following morning, at which time the appellant appeared, and claimed that the disturbance the day before had intimidated his witnesses, and that he was unable to secure their attendance, and he took no further part in the proceedings, and the respondent obtained a verdict of the jury, upon which the justice entered judgment. The judgment is rather informal, but not void. After the rendition of the judgment, the defendant made an ineffectual effort to appeal therefrom to the Circuit Court for the county of Wasco, and having failed in that, commenced a suit in said Circuit Court to have the enforcement of said judgment enjoined. The grounds of this suit were, that the justice's judgment was void; that he had not been able, on account of the riotous conduct of the respondent and others, to make his defense in the said Justice's Court; and that he lost

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his remedy by appeal in consequence of the mistake of the constable in not serving the notice of appeal. The pleadings in said suit were made up, and depositions were taken on both sides, which, with other proofs, were submitted to said Circuit Court. Upon hearing the case, said court found that the allegations of the complaint were not sustained, and thereupon dismissed it. From that decision this appeal is taken.

The question before the court is mainly one of fact. I have examined the testimony with some care, but have not been able to discover that the difficulty which occurred at the Justice's Court trial was of a very serious character. It seems to have been more of a temporary character than otherwise, occasioned by some of the witnesses who were outside of the court-room getting into a broil. The parties who were in the court-room became interested to know about the affair, and several of them went out, and the respondent took off his coat. How long the difficulty continued does not appear. It was not a respectable occurrence, but not necessarily indicative of a perverse sentiment in the community in which it took place, nor was it *sui generis*. Scenes of a similar character about Justices' Courts have frequently happened, and have been known to occur even in Circuit Courts, and failed to intimidate a party. Such occurrences will not justify a withdrawal from a trial and the commencement of a suit in equity to impeach the proceeding at law, unless attended with such a degree of violence as to obstruct public justice, and the adverse party takes a fraudulent advantage of the situation. When order cannot be maintained in courts of law, it will not long survive in courts of equity. And when it cannot be upheld in the inferior tribunals, they should be abolished. If the grounds upon which jurisdiction in equity is claimed in this case were conceded, it would be to my mind a humiliating admission. I should be loth to acknowledge that a regular trial of the right of possession of an eight-months old colt, of the value of thirty-five dollars, could not be had before any justice of the peace in any precinct in this State. I may be too incredulous in that particular, but, if I am mistaken as to the fact, the attention of the grand jury should be directed to

Points decided.

such precinct at once. At least, some other remedy should be applied than taking such a character of litigation into the bosom of chancery.

But it is idle to consider the question involved. There is no feature of it to which equity jurisdiction will attach. The appellant had a plain, speedy, and adequate remedy at law, and it was not exhausted when intimidation overtook his witnesses. An appeal to the Circuit Court, where he could have had a regular trial by jury, was open to him. All that was necessary was to serve a proper notice of appeal, give the requisite undertaking, and file a transcript of the proceedings of the Justice's Court with the clerk of the appellate court. The constable's mistake in not serving the notice of appeal was no excuse; the law does not compel a party in such a case to employ a constable, and he would have no business to employ an inefficient, careless one, under any circumstances. The failure has the appearance of having resulted from negligence, viewed from any point. The case has been dragged into the Circuit Court, and has cost more, I imagine, than the colt will ever be worth.

The judgment appealed from should be affirmed.

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[Filed June 11, 1885.]

THE CITY OF SALEM CO. v. THE SALEM FLOUR- ING MILLS CO.

CONSTRUCTION OF COVENANT.—A covenant in a deed provided "that the said S. F. M. Co. shall be entitled to have the Santiam water which is introduced to Salem by said W. W. M. Co., except the water right heretofore granted to the State of Oregon by contract, divided into two equal parts, and that one half of the same shall flow and be conducted by the race now in use to the premises herein granted to the party of the second part, and the other half thereof shall flow down in the natural channel of Mill Creek, or through such other channel as may be provided; said division of said Santiam water shall be made at or near the dam on the land claim of A. F. Waller and wife, where the race running to the oil mill is taken out of Mill Creek. . . . And it is further covenanted by and between the parties hereto, their successors and assigns, that the said S. F. M. Co. shall pay one sixth of the expense, or do one sixth of the labor, and furnish one sixth of the material necessary to maintain in full use and repair the head-race and gates on or near the Santiam River, now owned

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and used by W. W. M. Co. for introducing said Santiam water to Salem; also maintain the dam on said Waller's claim." . . . Held, that under said covenant, the dam on the Waller claim was to be maintained by the S. F. M. Co. at their own expense.

1D. — INJUNCTION—SUIT TO PARTITION WATER. — An injunction will not be granted against said S. F. M. Co. in favor of the W. W. M. Co., or its representatives, to prevent the construction of a dam by the former at the point indicated, but a suit may be maintained to compel an equal division of the water.

MARION COUNTY. Defendant appeals. Reversed and complaint dismissed without prejudice.

Geo. H. Williams, and Shaw & Burnett, for Appellant.

McDougall & Bower, and Tl. Ford, for Respondent.

THAYER, J. — This is an appeal from a decree rendered in a suit to enjoin the appellant from the construction of a certain dam upon what is known as Mill Creek, in the city of Salem. The parties are both private corporations, organized under the laws of the State of Oregon for the purpose of operating mills and manufacturing flour, and doing a general milling business. The respondent alleged in its complaint that it owned and operated two large flouring mills run by water-power supplied through the channel of Mill Creek, running among other places through the city of Salem, until it reached a point near said mills where, through a flume, it supplied them with water by which they were operated; that respondent was entitled to one half the water that ran in Mill Creek from natural and artificial supply; that it had the right to use and enjoy one half the waters flowing in said creek, and to make sales of water thereon, and to erect dams upon the same, and to erect, build, and maintain a dam, at a point known as the "bend" of said creek, at Waller's claim, in said city of Salem, in order to give water to the appellant, whose race entered said creek immediately above the point named for said dam, and that said appellant was entitled to have flow through said race, and from Mill Creek, one half the natural flow therein, and what water had heretofore been turned therein from the Santiam River; that the respondent had the right to maintain and repair such dam, and so con-

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struct and maintain the same as to cause a fair division of the water aforesaid in two equal moieties between the two parties; that for a period of over ten years a dam had been maintained at said point at the bend of said Mill Creek, in order to give, and was giving, the appellant one half of said water as aforesaid; that said appellant, on or about the 13th day of July, 1883, tore away said dam without any good cause, and against the will or consent of the respondent, and against its remonstrance built with heavy lumber, bolts, and planks another dam at the same point, but higher than the former dam, and so constructed the same that the appellant thereby got, or would have got, more than half the water flowing down Mill Creek, to wit, about two thirds thereof, to the injury, etc.; that the respondent, within the then last five days, demanded from the appellant its removal, and after its refusal to remove the same tore out the central portion of said dam, and commenced work to build another and proper dam instead thereof, with a view of dividing the water equally between said corporations, of which appellant had notice; that the appellant obstructed the respondent and its employees from proceeding with said work, and wrongfully took possession and control of the land adjoining such dam, and the channel of the stream, and had commenced to erect and build a dam of a permanent character, and strongly constructed, similar to the one already torn away, but of such a construction that the appellant will get about two thirds of the water coming down the channel of Mill Creek as aforesaid, to which it was not entitled. And the respondent charged that, unless the appellant was enjoined from further proceeding with the building of such dam, a permanent, irreparable injury would be done to the respondent, and it would not be able to run its mills as they were wont, and as respondent had a right to have them run, and that a great loss and damage would be done to the respondent if the appellant was not so enjoined from building and erecting such dam that it was engaged in so wrongfully erecting against the remonstrance of the respondent, and in violation of its rights; that respondent had no plain, speedy, and adequate remedy at law. Wherefore, respondent prayed

for a decree of said court restraining the appellant, and its servant or servants, from proceeding further with the erection of said dam, or interfering in any way with the respondent or its servants in the erection of a proper dam as above set forth, and costs and disbursements of the suit.

The appellant denied in its answer that it was only entitled to have flow through said race one half the natural flow of water in said creek, and what had been turned therein from the Santiam River; but averred that it was entitled to have flow into and through said race one half of the water as it had theretofore flowed in said creek, and also one half of the water in said creek as it might thereafter flow or be made to flow, including all water from the Santiam River, as well as the natural flow of the said creek; denied that the respondent had the right to maintain or repair said dam, or any dam, upon or across said creek, or to construct or maintain the same for any purpose, and denied that the dam theretofore existing at the said bend of Mill Creek gave, or was giving, to the appellant one half of the water theretofore flowing through said creek; denied tearing away the old dam without any good cause, or against the will or consent of the respondent, or that against its remonstrance it built another dam at the same point, or that it constructed any such dam so that it got or would have received more than one half of the water flowing down Mill Creek; and denied all injury and damage alleged in the complaint. Averred that the dam referred to in the complaint was an old, decayed, and leaky dam, and did not turn one half of the water flowing to it into the race, so as to give appellant the use of one half of the water flowing in said creek; that appellant proposed to join with respondent in the construction of a new dam in place of said old one, but that the latter refused, and that thereupon the appellant removed the old dam, and with the knowledge and consent of respondent, erected a new, good, and substantial dam in place thereof, which it claimed was constructed so as to divide the waters of said creek equally between the parties. Denied that the respondent demanded the removal of the new dam, and averred that it secretly, and in the night time, destroyed it, and

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thereby prevented the waters from going to appellant's mill; denied that the respondent commenced the construction of another dam with the view of dividing said waters equally; denied that it obstructed respondent from proceeding with said work, and alleged that the respondent pretended to do some work near said dam for the purpose of harassing appellant; admitted that another substantial dam had been erected in place of the one torn away by respondent, but denied that by means of it appellant would get more than one half of the water; averred that the new dam was dividing the water equally between the parties; and denied that any injury would be done the respondent by means of the said dam, or that it would not be able to use its mills as they were wont, or as it had the right to have them run. The appellant also, by way of counter-claim, alleged that on the 17th day of December, 1856, the legislative assembly of the Territory of Oregon incorporated the Willamette Woolen Manufacturing Company with power to bring water from the Santiam River to any place or places in or near Salem, through the channel or valley of Mill Creek, and with power to enter upon lands, and also said creek, and to do all things proper and suitable for the safe, direct, and economical conveyance of the water aforesaid. Said corporation was to have exclusive right to the hydraulic powers and privileges created by water taken by it from the Santiam River, and the right to rent and sell the same, or any portion thereof, as it might deem expedient; that on the 11th day of April, 1870, said corporation executed a deed to the said Salem Flouring Mills Company for certain real estate, mill machinery, flumes, dwelling-houses, wharf, and water-power, with their appurtenances, as therein described. Said deed contains the following covenants and agreements between the parties thereto:—

“And the said parties hereto mutually specially covenant and agree unto each other, their successors and assigns, and this covenant shall be construed to run with the title to said premises, as follows, to wit: That the said S. F. M. Co. shall be entitled to have the Santiam water, which is introduced to Salem by said W. W. M. Co., except the water right heretofore granted to the

State of Oregon by contract, divided into two equal parts, and that one half of the same shall flow, and be conducted by, the race now in use, to the premises herein granted to the party of the second part, and the other half thereof shall flow down the natural channel of Mill Creek, or through such other channel as may be provided; said division of said Santiam water shall be made at or near the dam on the land claim of A. F. Waller and wife, where the race running to the oil mill is taken out of Mill Creek; that said S. F. M. Co. shall be entitled to the use and flowage of the natural water of said Mill Creek to the same extent, and in the same manner, as the said W. W. M. Co. is now entitled, but at no time shall said party of the second part draw, or cause to flow to their works, more than one half of said natural flow of Mill Creek; and it is further covenanted by and between the parties hereto, their successors and assigns, that said S. F. M. Co. shall pay one sixth of the expense, or do one sixth of the labor, and furnish one sixth of the material, necessary to maintain in full use and repair the head-race and gates on or near the Santiam River, now owned and used by said W. W. M. Co. for introducing said Santiam water to Salem; also maintain the dam on said Waller claim; and said S. F. M. Co. further agree to pay one sixth of the expense, or do one sixth of the work, of clearing out the channel of Mill Creek, and enlarging the said head-race and gates, in case the owners of four of the six water powers of Salem shall in future decide to enlarge the flowage of water from said Santiam River to Salem, aforesaid. And the said S. F. M. Co., their successors and assigns, shall pay one sixth of all damages caused, or to be paid, on account of maintaining, continuing or enlarging said head-race, works, or the flowage of said waters from the Santiam River to Salem; and it is further covenanted and agreed that said W. W. M. Co., its successors and assigns, shall keep up, or cause to be kept up, the necessary works and improvements to secure the usual flow of the Santiam water through their race and head-gates near the Santiam River to Salem, at all reasonable times, inevitable accidents excepted, and shall be liable to pay five sixths of the expense thereof, and the said S. F. M. Co. shall

be liable to, pay the remaining one sixth of the expense thereof."

That appellant, by authority of the Willamette Woolen Manufacturing Company, proceeded to construct a new dam in place of the old one, after requesting respondent to join in the construction thereof; but before putting up the dam it requested the respondent to examine the plan of the proposed new dam, and its mode of construction, so as to be satisfied that it would fairly and equally divide the water between the parties, and thereupon the respondent sent its engineers, who, with the engineers appointed by the appellant, examined the plans and mode of building said dam, and agreed that it would be a dam when completed that would equally and fairly divide the water; that after removing the old dam, the appellant constructed on the site of it the new one, according to the plans and specifications agreed to by said engineers; that soon after, as before mentioned, the respondent destroyed it, and wantonly and maliciously destroyed the timbers and lumber of which it was constructed; that thereupon the appellant, by authority of the W. W. M. Co., erected the new one; that just before its completion the respondent, by false misrepresentations, obtained from the county judge of Marion County an injunction to restrain appellant from completing it, and thereupon the W. W. M. Co. completed it; that the object and purpose of the respondent in its proceedings were to prevent appellant from having the use of one half of the water; that it had machinery and mills of great value, wholly depending upon said water for their operative power, which, if the water were diverted, would be rendered of little or no value.

After alleging other grievances committed by the respondent, the appellant prayed an injunction against the respondent. A reply was filed on the part of the respondent to the new matter set forth in the answer, in which the respondent admitted the incorporation of the Willamette Woolen Manufacturing Company, as alleged in said answer, but denied that it executed a deed to appellant with covenants as set forth therein, except as especially set out in said reply, in a deed of conveyance of the 11th day of April, 1870, attached thereto and marked Exhibit

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A, but denied specifically every other allegation of such new matter. The deed of which said Exhibit A is alleged to be a copy is the deed of April 11, 1870, referred to in appellant's answer, and contains the following additional covenant, relating to the grant of the water right in the water flowing in said creek, viz. :—

“ And it is covenanted and agreed that the Salem Flouring Mills Company shall have the right to construct a waste gate through the levee, near the creek and block No. 36, or through the flume above the long bridge, so as to discharge all or any part of the water belonging to said Salem Flouring Mills Company into the bed of South Mill Creek, as the convenience of said party of the second part may require. And it is further understood and agreed that, in case any time hereafter said Willamette Woolen Manufacturing Company shall desire to introduce Santiam water to Salem for the purpose of watering the city, they shall have the privilege of diverting a sufficient amount of water from Mill Creek, above Salem, for such purpose, provided, always, that they introduce and cause to flow into the channel of said Mill Creek a sufficient amount of Santiam water, additional to what is used for milling purposes, as will make said mill powers at Salem as good as before the use of any part thereof, for watering said city. And in case said Salem Flouring Mills Company shall desire to take a sixth part or interest in said project of watering said city of Salem, they shall be entitled to do so, by paying one sixth part of the cost of said water-works, and paying one sixth of all expenses thereof at the time when the same are constructed.”

These are the substantial issues in the case. There were many charges of bad faith and criminations and recriminations made, but they do not affect the main points. The pleadings were very extensive, though the issues tendered by them may, taken all together, be resolved into a simple question of controversy. Each of the parties had flouring mills; each required the water that flowed down Mill Creek to operate them; and each was confessedly entitled to one half the water thereof. The appellant, in order to secure a flow of the water to its mills, was compelled

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to have a dam across the creek at a point below and near the mouth of its race. Its right to a dam is conceded, and the point of its location had, long prior to the time of the commencement to build it, been selected. The condition of the old dam as to decay and being out of repair is made an issue in the case, but certainly not a very important one, as the covenant in the said deed of April 11, 1870, expressly required the appellant to maintain the dam. The appellant alone was interested in keeping it up, and if it built a new one every six months, the respondent was not affected at all. The respondent was only entitled to one half the water, and without the dam it would get all of it. It was necessary, therefore, for the appellant, as well as obligatory upon it, to have a dam, and unless the building of it in some way interfered with the respondent's getting its half of the water, the latter had no cause of complaint. The pleadings show that the appellant had authority to build the dam, subject only to the restriction that it should be built on the site on Waller's claim where the old dam was situated, on the said 11th day of April, 1870; that is, the covenant to maintain the dam, the old dam, implied the right and imposed the obligation upon the appellant to rebuild it, otherwise it could not be maintained. The maintenance of the dam would probably imply that, in the event of its having to be rebuilt, it should be built on the same spot. This would be the strongest construction that could be claimed against the appellant. The height of the dam, and the manner of constructing it, are, so far as appears from the pleadings, unrestricted. The appellant is limited by the terms of the covenant as to the amount of water it is entitled to, that is, it is entitled "to have the Santiam water which is introduced to Salem by said W. W. M. Co., except the water right heretofore [theretofore] granted to the State of Oregon by contract, divided into two equal parts, and that one half of the same shall flow and be conducted by the race now [then] in use to the premises herein [therein] granted to the party of the second part, and the other half thereof shall flow down in the natural channel of Mill Creek, or through such other channels as may [might] be provided." As

to the water naturally flowing in said creek, the appellant is, by said covenant, restricted as follows:—

“That said Salem Flouring Mills Company shall be entitled to the use and flowage of the natural water of said Mill Creek to the same extent and in the same manner as the said Willamette Woolen Manufacturing Company is now [then] entitled, but at no time shall said party of the second part draw or cause to flow to their works more than one half of said natural flow of Mill Creek.”

It may be inferred from the pleadings, and the proofs show, that the respondent, since the execution of the said deed of April 11, 1870, has succeeded to the rights of the said Willamette Woolen Manufacturing Company in said water, and occupies the relation to the appellant of a purchaser of those rights from said woolen company under a purchase thereof subsequent to the execution of that deed. It may therefore be deduced from the pleadings alone that the respondent had the right to have one half of the water that flowed in Mill Creek, including the water from the Santiam River, and that which ran naturally in said creek, “flow down the natural channel of Mill Creek, or through such other channels as may be provided,” subject to the water rights granted to the State, as referred to in said covenant, and that the appellant had the right to have the other half thereof turned into its race, and that it had the authority and was compelled, at its own expense, to maintain the dam on Waller’s claim that existed on April 11, 1870, and that the maintenance of the dam implied the right to rebuild it whenever in its discretion the exigency demanded it. I am satisfied that a careful reading of the covenants in the said deed of April 11, 1870, will convince anyone that the conclusion above suggested is the only proper one that can be drawn therefrom, and I am not able to discover why the agents of the respondent need to have been exercised on account of the building of the dam in controversy by the appellant. The right to build a dam at the point where this dam was located, and to turn the water into the appellant’s race, we may infer from the pleadings was secured from Waller, and if the right granted for that purpose did not authorize the

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kind of dam the appellant constructed, then Waller, or his successors in interest, have a right to complain, but no one else has unless he can show that his vested rights are thereby injuriously affected; and I do not understand that the respondent claims or has attempted to show that it has succeeded to Waller's residuary interest in the claim upon which the dam was built.

It is, however, claimed by the respondent that the character of the dam the appellant was constructing when the suit was commenced would not enable the water to be divided equally; but that would be the misfortune of the appellant. Its covenant limited it to the use of one half of the water, and it would have no right to take more under any circumstances; if it did, it would render itself liable to damages, and to be enjoined from so doing. The respondent had no right to dictate the kind of dam the appellant should construct, but it had the right to object to its taking more than its half of the water. The appellant had bound itself by its covenant not to do so. "That the Salem Flouring Mills Co. shall be entitled to have the Santiam water," etc., "divided into two equal parts, and that one half of the same shall flow and be conducted by the race now in use to the premises herein granted to the party of the second part, and the other half thereof shall flow down in the natural channel of Mill Creek, or through such other channel as may be provided." "That said Salem Flouring Mills Co. shall be entitled to the use and flowage of the natural water of said Mill Creek," etc., "but at no time shall said party of the second part draw or cause to flow to their works more than one half of the said natural flow of Mill Creek," is the language of that instrument. When the appellant turns into its race more than one half of the water flowing in said creek, then the rights of the respondent are invaded, and if it should threaten to do that, and there was a well grounded apprehension that it would carry the threat into execution, a court of equity might interfere to prevent it. But the respondent has no right to complain about the dam, though it were built eighteen feet high, and diagonally across the stream, unless it could show that it would necessarily cause to flow into said race more than half of said water. The dam does not

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divide the water. It creates a head so as to enable the appellant to turn into its race its portion of it. The race might not be of sufficient capacity to receive half the water; then how would the dam cause the respondent injury? It commenced its suit prematurely. The appellant had not violated its covenant not to take more than half the water, nor threatened to, and respondent's rights were not affected nor jeopardized. The most that can be said against the dam is that the plan of it is such as will render it inconvenient to divide the water accurately, but the appellant will necessarily be the sufferer from that circumstance. If it takes more than half the water in any event, it will do so at its peril. Besides, there are no facts alleged in the complaint showing why the dam in question could not be employed so as to enable an equal division of the water to be made. The evidence shows that it has been constructed with weirs to gauge the water that passes into Mill Creek, and that the water discharged into appellant's race passes through weirs provided for the like purpose.

I am unable to see how the suit can possibly be maintained upon the pleadings in the case. There has been a mass of testimony taken, tending to show the comparative amount of water the parties have been receiving since the dam complained of has been used, but it fails to prove that the structure is of such a character that an equal division of the water cannot be secured by means of it, and that is the vital issue the respondent must maintain to support his case by the record. Its complaint is against the construction of the dam, and the relief demanded is that the appellant be restrained from proceeding further with the erection of it, or from interfering with the respondent in the erection of a proper dam, with the view of dividing the water equally between the parties; but why the dam the respondent proposed to build will effect that end any better than the one in question, the complaint wholly fails to state. It is idle to allege that the dam the appellant was constructing would not divide the water equally, and that another one would, without pointing out the difference between them, or giving any reason why the one would be superior in excellence to the other; and yet that

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is the condition of the respondent's complaint in the case. A court of equity has undoubted authority to regulate the use of water, the right to which belongs to two or more persons in common, so as to preserve the right of each owner. (Gould Water, § 540; Angell Water Courses, § 447 *a*, and cases referred to in the notes.) But this suit is not brought for that; the complaint was not framed in view of such remedy, nor does the relief demanded therein include it. A suit of that character would, under the circumstances, have been a very appropriate proceeding. The squabble between the officers of the two corporations, resulting in the pulling down and destroying of one dam and the preventing by force the erection of another, was unworthy of the gentlemen who occupied those positions. The door of the courts was open for the settling of the controversy, and they should have resorted to them in order to secure its adjustment. The respondent did begin a suit, but it entered the controversy in the forum where it had ended in the field. It was to complete by law what it had failed to effect by force; the preventing the appellant from building a dam, and the opportunity to build one itself. The Circuit Court strode over the case made by the pleadings, and attempted to adjudicate upon it the same as though it had been regularly and properly presented by the allegations of the parties. That course was a practical disposition of the affair; but I think the court should have directed the pleadings to have been amended, so as to have had the decree in accordance therewith.

It is a well-established principle of the law that a party must recover *secundum allegata et probata*; and aside from that, the decree of the court settled nothing. It found as a fact that the appellant was receiving twenty-five per cent more of the water than the respondent was, and, as a conclusion of law, that the respondent was entitled to receive twelve and one half per cent more water than flowed to it through the three open weirs which discharged into Mill Creek, and decreed that the respondent have authority to enlarge one of said weirs so as to discharge into said creek twelve and one half per cent more water. Relief of that character cannot properly be decreed in that way. The

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decree should have been made so as to have required the appellant to desist from turning the amount of water it was using into its race; compelled it to lessen the size of its weirs so as to draw off no more water than was discharging into the creek. The decree should have been made so as to operate personally upon the appellant; then, if it did not obey it, its officers could have been attached for contempt of the court. Authorizing the respondent to enlarge the weirs discharging into Mill Creek would lead to endless controversy, whenever it exercised the authority granted by the decree. The appellant would have been very likely to have claimed that the enlargement was greater than had been permitted, and in turn have commenced a suit to restrain the respondent from taking so large an amount of water. Besides, it would not have been prudent to leave such a matter to an interested party to adjust, and is not in accordance with the usual course of judicial proceedings. It is too much in the nature of a reprisal. The authorities maintaining the jurisdiction of a court of equity to adjust the rights of parties having a common interest in water for hydraulic purposes are numerous, but I have been able to find but one which indicated with any degree of particularity the manner in which the adjustment should be made; that is the case of *Olmsted v. Loomis*, 9 N. Y. 423, which, in some respects, was similar to this, though the facts were more complicated. The court there held that the true and proper remedy was in the court of chancery, and that the mode by which the controversy could be determined with the least expense, and the greatest certainty of doing justice, was by a reference to one or more suitable referees, one of whom should be a capable engineer or mill-wright. The court said that "such a referee can learn more of the true merits of the case in a day, upon an actual view and examination of the mills and premises, than a jury or court can ever learn from hearing or reading the testimony of witnesses."

This course of proceeding by a referee and view has another advantage over an action at law. It enables the court to exercise its power of preventing future litigation. Powers may be given the referee to prescribe and establish, under the direction of the

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court, some fixed mechanical gauge by which the quantity of water to which the plaintiffs are entitled may be kept within the main race, and not drawn off into the defendant's side race. This has frequently been done in cases of this description, and when parties cannot otherwise agree, and are disposed to be litigious, it is perhaps the only mode of preventing continual irritation and litigation between them. (*Olmsted v. Loomis*, N. Y. 430, 431.) If, in the present case, a course had been adopted similar to that suggested in *Olmsted v. Loomis*, it would have been much more satisfactory than a hearing upon depositions or oral testimony. The authority of the court to appoint a referee to ascertain any fact in a civil action, suit, or proceeding is ample. (Civ. Code, § 938, subd. 2.) By that mode a decree could have been rendered that would have judiciously adjusted the matter in controversy between the parties, and been final, so long as the condition of their affairs remained unaffected by forces beyond their control.

The proofs, however, in the case disclose a fact that embarrasses very much its settlement. It appears that two persons, Stratton and McCornack, are riparian owners of the land at the point where said dam is located, and for some considerable distance above and below it, and that they have, at a recent date, constructed a race connecting with Mill Creek at a point immediately above said dam, and by means of which they conduct a quantity of the water thereof through their premises, and discharge it into the creek at a point below the dam; that they have constructed head-gates at the mouth of their race, and from time to time turn into it from the creek a supply of water sufficient to run a small mill owned by them. The water discharged from their race runs down to the respondent's mills, and unless the amount thereof is estimated in the division of the water of said creek between the appellant and respondent, as provided in the said covenant, the latter will obtain that amount more than one half of it. It was claimed by the respondent upon the argument that the circumstance last referred to should not be considered, for the reason that Stratton and McCornack had no right as against either of the parties to divert the water

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of the creek, and that the covenant in the said deed of April 11, 1870, specified that the division of the water of the creek should be made at the dam. It may not appear from the proofs that Stratton and McCornack have any right to turn the water into their race, but it would not be safe or prudent to adjudge that they had no such right in a case to which they were not parties. The adjudication would not, of course, bind them, and an attempted settlement of the rights of the parties to the suit, made upon the assumption that Stratton and McCornack were wrong-doers in their diversion of the water, would leave the matter in uncertainty and doubt.

In regard to the division of the water at the dam, the language of the covenant is as follows: "Said division of said Santiam water shall be made at or near the dam of the land claim of A. F. Waller and wife, where the race running to the oil mill is taken out of said creek." Whether this language would necessarily require the division to be made below the mouth of Stratton and McCornack's race is not, as I view it, important. Each of the parties to the suit is entitled, as a matter of right, to one half of the Santiam water, and of the water naturally flowing in the creek. The division is to secure to each of them that right, and if, by means of the race, a material part of the water is turned off above the point of division, but the respondent receives the benefit of it the same as it would if not diverted, it must, as a matter of equity, be considered in the admeasurement of the water each is to have. The claim to such extra amount of water is unconscionable, and in violation of the maxim that "equality is equity"; and besides, there is nothing shown in the case that would estop Stratton and McCornack, if made parties to the suit, from proving that they had obtained a right, either from the respondent or from the Willamette Woolen Manufacturing Company, prior to the acquisition by the respondent of its interest in the premises, to divert and use the water in the manner they have done. It is impossible, in my opinion, to sustain the decree of the Circuit Court, or to grant the respondent any relief upon the pleadings as they are framed, consistently with equity and justice. The ordinary course, in such a case, would

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be to dismiss the complaint. But a large amount of testimony has been taken tending to show the amount of water the parties respectively are receiving. Many of the witnesses were professional experts in hydraulics, and a large expense has been incurred. The case ought to be definitely settled, but it cannot be done unless it is sent back to the Circuit Court, the complaint amended, and Stratton and McCornack made parties. A referee could then be appointed to ascertain and report a proper mode for dividing the water. I have not examined the testimony with a view of determining which party has been receiving the most of the water that flows in Mill Creek. I had an impression, when the case was argued, that the appellant was getting the larger portion of it, if the amount turned into Stratton and McCornack's race was not included, but all that evidence was in regard to water received by the parties after the commencement of the suit, and was irrelevant to the issue made by the pleadings. The threatened building of the dam was the "head and front of appellant's offending," and there was no cause for that. If the dam was so constructed that the weirs in the head-gate of appellant's race would discharge more water into the race than the same number and sized weirs in the dam would discharge into Mill Creek, the difference could easily be remedied. The Circuit Court seemed to have no difficulty upon that point. But the several amounts of water the parties receive can never be adjusted with mathematical precision. A fair, practical division of it is all that can be made. The more important determination is to establish the mode by which the division shall be made, in view of all the circumstances of the case.

A decree will be entered in accordance with the principles of this decision.

[NOTE. Upon a motion for rehearing of this case it was ordered that the complaint be dismissed without prejudice.—REF.]

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[Filed June 11, 1885.]

THE CITY OF CORVALLIS v. M. STOCK.

APPEAL—PRACTICE.—Unless expressly conferred by statute, there is no right of appeal from the decisions of a recorder's court in adjudications upon city ordinances.

STARE DECISIS.—The decision of this court in *Sellers v. City of Corvallis*, 5 Oreg. 273, criticised, but followed upon the principle of *stare decisis*.

BENTON COUNTY. Plaintiff appeals. Affirmed.

The defendant was convicted in the recorder's court for the city of Corvallis of the violation of an ordinance of that city, and appealed to the Circuit Court for Benton County. That court reversed the judgment of the recorder's court, and discharged the defendant, whereupon plaintiff appeals to this court.

J. W. Rayburn, for Appellant.

John Burnett, and *J. R. Bryson*, for Respondent.

THAYER, J.—This appeal involves the question of the right of appeal from the recorder's court. It was held by this court in the case of *Town of Lafayette v. Clark*, 9 Oreg. 225, that an appeal would not lie from the recorder of a city, in adjudications upon city ordinances, unless given by statute. The question here is whether the charter of the city of Corvallis gives such right of appeal. Upon an examination of said charter we have discovered that there is, in our opinion, no material difference between its phraseology and that employed in the Lafayette charter upon that subject. And we should be inclined to hold that it did not provide for such appeal were it not for the decision of this court in *Sellers v. City of Corvallis*, 5 Oreg. 273. That decision was rendered by judges occupying the same position as we do, and while we do not indorse it, nor regard the reasons upon which it was predicated as satisfactory, yet we do not feel at liberty to depart from it in this particular case. If it were a case of continued injustice, or of a clear violation of obvious principles of law, we ought not to hesitate a moment in pronouncing it not law; but under the circumstances we think

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Argument for Appellant.

we should be controlled by the doctrine of *stare decisis*. Which ever way we might determine the matter would be of no public importance, and as we find that the identical question has been adjudicated upon and acquiesced in for a number of years, have concluded that we should not attempt to disturb it.

For these reasons we are of the opinion that the judgment appealed from should be affirmed.

[Filed June 25, 1885.]

MICHAEL SULLIVAN v. OREGON RAILWAY AND NAVIGATION COMPANY.

EVIDENCE—DECLARATIONS OF PARTY—RES GESTA.—In an action for damages for injuries resulting from ejection from a railroad train, the declarations of the plaintiff immediately after the event, in the absence of the defendant, narrating the occurrence, are not part of the *res gestæ*, and cannot be given in evidence.

ID.—OWNERSHIP OF TRAIN.—In such an action it is incumbent on the plaintiff to prove, not who was the owner of the train, but who was using it at the time.

EXEMPLARY DAMAGES.—Exemplary damages cannot be recovered of a corporation or other person for the wrongful acts of its servant, even when wilful and malicious, unless the employer directed the doing of the act, or ratified it when done, or unless it is chargeable with gross negligence in the employment or retention of such servant.

ID.—PLEADING.—In order to recover exemplary damages it must appear from the complaint that the act occasioning the damage was done maliciously, or was the result of wilful misconduct of the defendant, or of that reckless indifference to the rights of others which is equivalent to an intentional violation of them.

WASCO COUNTY. Defendant appeals. Reversed.

The facts are stated in the opinion.

Rufus Mallory, and *F. P. Mays*, for Appellant.

To be a part of the *res gestæ* the declarations must be made at the time of the act done which they are supposed to characterize, and well calculated to unfold the nature and quality of the facts which they are intended to explain, and so to harmonize with them, as obviously to constitute one transaction. (*Enos v. Tuttle*, 3 Conn. 250; *Nutting v. Page*, 4 Gray, 584; *Lund v.*

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Argument for Respondent.

Tyngsborough, 9 Cush. 36.) The declaration of a party cannot be introduced as a part of the *res gestæ*, when the declaration is itself the proof of the main fact sought to be established. (*Brown v. Lusk*, 4 Yerg. 210; *Chapin v. Marlborough*, 9 Gray, 244; *Lund v. Tyngsborough*, *supra*.) Declarations which are merely narrative of past events are not admissible as part of the *res gestæ*. (1 Greenl. Ev. §108; *State v. Davidson*, 30 Vt. 377; *Worden v. Powers*, 37 Vt. 619; *Commonw. v. Densmore*, 12 Allen, 537; *Bacon v. Inhabitants of Charlton*, 7 Cush. 581; *State v. Pomeroy*, 25 Kans. 349; *Mutch v. Pierce*, 49 Wis. 231; *Corder v. Talbott*, 14 W. Va. 290, 291; *Nutting v. Page*, *supra*; *Lund v. Tyngsborough*, *supra*.) To be part of the *res gestæ* they must be contemporaneous with the main fact. (1 Greenl. Ev. 108; *State v. Pomeroy*, *supra*; *Mutch v. Pierce*, *supra*; *Downs v. Central R. R. Co.* 47 N. Y. 83; *Cleveland C. & C. R. R. Co. v. Mara*, 26 Ohio St. 185; *Mitchum v. State*, 11 Ga. 615; *State v. Brown*, 64 Mo. 371.) These declarations were offered and admitted merely to support Sullivan's testimony as to the main fact, by showing that he had said the same thing at another time and place. This is never allowed. (*Corder v. Talbott*, *supra*; *Downs v. Central R. R. Co.* *supra*; *Chicago & N. W. R. R. Co. v. Finlayson*, 57 Ill. 265; *State v. Davidson*, *supra*; *Worden v. Powers*, *supra*; *Banfield v. Parker*, 36 N. H. 354; *Woodward v. Paine*, 15 Johns. 493; *Cleveland C. & C. R. R. Co. v. Mara*, 26 Ohio St. 185.)

Gates & Wilson, and *J. E. Atwater*, for Respondent.

When exemplary damages are claimed, all the circumstances connected with the case are admissible in evidence, and in this respect the courts have always been very liberal. This was a circumstance proper to place before the jury. (1 Sutherland Dam. 724; *Voltz v. Blackmar*, 64 N. Y. 440; *Bacon v. Towne*, 4 Cush. 217.) Incidents not forming a part of a calculated policy of the plaintiff, and thus unconsciously associated with the principal transaction, become evidence of the character of the transaction, and are part of the *res gestæ*. (*Ins. Co. v. Mosley*, 8 Wall. 397; *Commonw. v. McPike*, 3 Cush. 181; *People v.*

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Vernon, 35 Cal. 49; *State v. Garrand*, 5 Oreg. 216; *King v. Foster*, 6 Carr. & P. 325; *Boyden v. Moore*, 11 Pick. 362; *Abbott Trial Ev.* 648; *Wharton Crim. Ev.* 263; *Harriman v. Stowe*, 57 Mo. 93; *Commonw. v. Rowe*, 105 Mass. 590.) The right to recover exemplary damages applies to corporations for the acts of their agents as well as to natural persons, and this, too, to acts wilfully and maliciously done, as well as to those carelessly or negligently done. (*Goddard v. Grand Trunk Railway Co.* 2 Redf. Am. Ry. Cas. 502; *Atlantic & G. W. Railway v. Dunn*, 2 Redf. Am. Ry. Cas. 520; *New Orleans etc. R. R. Co. v. Bailey*, 40 Miss. 453; *New Orleans etc. R. R. Co. v. Hurst*, 36 Miss. 660; *Hopkins v. Atlantic & St. Lawrence R. R.* 36 N. H. 9; *Baltimore & O. R. R. Co. v. Blocher*, 27 Md. 277; *St. Louis A. & C. Railroad Co. v. Dalby*, 19 Ill. 353; *Passenger R. R. Co. v. Young*, 21 Ohio St. 518; *Balt. & Yorktown Turnpike v. Boone*, 45 Md. 344.)

THAYER, J.—This appeal is from a judgment rendered in an action to recover damages in consequence of the appellant having been put off a train of cars alleged by him to have been owned and operated by the appellant. The respondent alleged in his complaint that on the 10th day of October, 1883, he went aboard of said train of cars at Dalles City, a regular station on the line of appellant's road, for the purpose of being conveyed to Portland, and that the conductor thereof, after the cars had started and were in motion, ejected him therefrom, by reason of which he was thrown under the wheels of the cars, and had his right foot so badly crushed that it had to be amputated. The language of the allegation of the complaint referred to is as follows:—

“That after the said train of cars had gone about one fourth of a mile from said Dalles City, and while said train of cars was rapidly moving along its said railway, the defendant, by its agent and employee, who then had control, care, and conduct of said train of cars for defendant, carelessly, negligently, and with force, ejected this plaintiff from its said train of cars, and caused him to fall from said cars to the ground while the same were so

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rapidly moving, and by reason of the said careless, negligent, and wrongful acts of the defendant, the plaintiff was thrown under the wheels of said cars, which cars then and there, on account of the wrongful acts of the defendant, as aforesaid, ran upon and over the plaintiff, and crushed and wholly destroyed his right foot."

The amount claimed, of general and special damages, was \$50,000. The appellant took issue respecting ownership and operation of said train of cars, the ejecting the respondent therefrom, and the damages alleged by respondent to have been sustained. It also set up in its answer that the injury received was in consequence of the appellant's carelessness and negligence. It appears from the bill of exceptions that the controversy at the trial was mainly as to whether the conductor of the train pushed the respondent off the cars, or that he jumped off at his own instance. The respondent testified that the conductor pushed him off while the cars were in motion; the conductor, on the contrary, denied that he touched him; testified that he did not know when he got off the cars; that he went and pulled at the bell-rope, and when he looked around the respondent was off. Another witness called by appellant, who seems to have been a passenger aboard the train, testified that he saw the whole affair, and corroborated the testimony of the conductor; stated that the conductor did not touch respondent. He also testified that the respondent jumped off the train. The jury returned a verdict for the respondent for the sum of \$11,459, upon which the judgment appealed from was entered. The questions submitted upon the appeal involve the competency of some of the evidence given to the jury, and the correctness of a part of the instructions of the court to the jury, which we now proceed to notice.

The bill of exceptions also shows that the respondent was a witness in his own behalf; that after he took the stand and was sworn he stated that he went aboard the train of cars at Dalles City on the 10th day of October, 1882; the train was bound west; that it was in front of the Umatilla House where he went onto the train; that he went aboard of it for the purpose of

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going to Portland; that the train was an Oregon Railway & Navigation Company's train, engine No. 80, marked "O. R. & N. Co."; that it was a passenger train; that one Garfield was the conductor. He was asked by his counsel to state all that took place on board the train at and about the time he received the alleged injury. In answer to the questions he began by stating that he got on the train in front of the Umatilla House and had a conversation with the baggage-master, which he began to relate, whereupon the appellant's counsel objected to it, but the court overruled the objection, and allowed the respondent's counsel to ask the witness this question: "State what you said to the baggage-master, and what he said to you." To which ruling the appellant's counsel excepted, and the witness stated in answer to the question that he got on the train just before it started; that he asked the baggage-master how Garfield was to ride with, to which the latter answered: "I guess he is all right; if he makes any 'kick' refer him to me."

This evidence was clearly inadmissible. The conversation between the witness and the baggage-master was wholly incompetent, but a majority of the members of the court are of the opinion that the evidence in nowise prejudiced the appellant; that it was really more calculated to prejudice the respondent's case than to benefit it. The witness then proceeded to narrate the circumstances of the injury. He testified that soon after the train started Garfield came out of the baggage car while he was standing on the platform at the forward end of the smoking car. A man named Clayton was with witness. There were two other men on the platform; the passengers went inside. While we were conversing Garfield came out of the baggage car, and I spoke to him for a ride to Portland, as a favor from a railroad man. He said, "I don't know you, and don't want to." Clayton handed him his pass while we were talking. Garfield said to me, "you will have to get off this train; you can't ride." Witness told him, "All right; stop his d—— train and he would get off." Witness then states that the conductor pulled the bell two or three times to stop the train, but it did not stop; that thereupon the conductor pushed him off the train, whereby he

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received the injury complained of. After the witness had been examined he called Charles Pool as a witness, who testified, among other things, that he saw the train pass west, and shortly after it had gone heard some one cry out "Oh, say! Oh, say!" Went to where the person was and found the respondent. The respondent's counsel then asked the witness this question: "What did respondent say?" The appellant's counsel objected to the question, upon the grounds that the testimony was not competent. The court overruled the objection, and the witness answered: "I asked him what was the matter, and he said: 'The son of a bitch pushed me off' or 'threw me off'; I am not sure which. This was two or three minutes after the train passed. The train stopped just as it came through the cut out on the flat."

The respondent then called two other witnesses to prove same facts, who were each asked some questions, which were objected to by appellant's counsel upon the same grounds, and the same ruling was made by the court, and exception taken. One of the witnesses answered that respondent said upon the occasion referred to, "Garfield pushed me off"; and the other, "that he had been pushed off the train." This testimony was calculated to influence the verdict of the jury, and if incompetent, the judgment entered thereon should be reversed. Such testimony has in many instances been admitted in evidence, and courts have attempted to give reasons for holding it competent. The line of authorities in this country which maintain its admissibility seems to have commenced with the case of *Commonw. v. McPike*, 3 Cush. 184. The courts that have followed the ruling in that case have frequently manifested a sort of hesitancy as to its correctness, but have concluded that such statements were a part of the *res gestæ*, and been content to place their decisions upon that ground.

That mode of disposing of important questions of proof in such cases is becoming quite unsatisfactory. Its tendency has been to overthrow one of the fixed principles of the law, that the best evidence which the nature of the case is susceptible of shall be produced, and it leads to uncertainty and doubt. It is very

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easy to say that the statements and declarations of a party who has received an injury, made after its occurrence, as to how it was occasioned, are a part of the *res gestæ*, but extremely difficult to explain it, and many times wholly impossible to point out any rule under which the determination has been arrived at. An act may sometimes be explained, or its nature and quality be ascertained, by an accompanying declaration which may be properly regarded as a part of the transaction in which it occurred, but it is never the act itself, nor the mere evidence of it.

If a party were to be set upon and wounded, his narration of the circumstances attending the affair, or declarations as to who inflicted the injury, made after the transaction was ended and his assailant gone, would be no part of the occurrence; it could only be his own account of the affair. None of the class of cases referred to furnish any certain test as to when such declarations may be given in evidence as a part of the *res gestæ*. It is said in some of them that they must have been made at the time the act transpired; but in others, that a considerable time may elapse and they still be such part; that each case must depend upon its own peculiar circumstances, and be determined by the exercise of a sound judicial discretion. I do not fully understand what is meant by the latter expression. If it is intended by "a sound judicial discretion" that the court before whom the trial is had must judge as to whether the transaction was continuing when the declaration was made, or had ended prior thereto, then the question would not differ from other questions regarding the admissibility of testimony; the court would consider the facts and circumstances surrounding the affair, and determine therefrom as to its competency; but if, on the other hand, it is to be understood that the court is to decide the question in accordance with the judge's notions as to the justice of the particular case, then it is afloat without any chart to direct it. Precedents, under that view, would be of little value, as the peculiar circumstances attending each transaction would be likely to vary from those surrounding others of a like character which had been adjudicated upon sufficiently to authorize a different holding. Such theory necessarily abrogates any law upon the subject, as law is,

as a rule, applicable to a class of cases which are alike in principle.

The question is too important to be left to such uncertainty, and there is no occasion for leaving it to be determined by vague speculation. The authorities upon the subject are quite numerous, and are widely different. The Massachusetts cases, with the exception of the one referred to, have generally held to a reasonable and consistent rule upon that branch of evidence. They have repudiated the notion that the admission of such declarations is left to the discretion of the presiding judge, and admit them only when they are calculated to explain the character and quality of the act, and are so connected with it as to derive credit from the act itself, and to constitute one transaction. (*Lund v. Inhabitants of Tyngsborough*, 9 Cush. 41.) This appears to me to be as liberal a rule as any court can, consistently with the rules of evidence, sanction, and I think it very doubtful whether our courts, under certain provisions of our statute, would have any right to permit the introduction of declarations of parties as evidence, except under the condition of circumstances above referred to. Section 672, Civil Code, provides that a witness can be heard only upon oath or affirmation, and he can testify of those facts only, which he knows of his own knowledge; that is, which are derived from his own perceptions, except in those few express cases in which his opinions or inferences or the declarations of others are admissible. And section 676, Civil Code, provides that where the declaration, act, or omission forms part of a transaction, which is itself the fact in dispute, or evidence of that fact, such declaration, act, or omission is evidence as part of the transaction. These provisions of the statute are declaratory of the law upon the subject, and are binding upon the court; they limit the right of a party, in the introduction of that character of testimony, to those cases where the declaration forms part of the transaction which is in dispute, and provide that it is evidence as part of it.

This statute undoubtedly lays down the rule as broadly as many of the decisions of the court have done, especially some of the later ones (See *Waldele v. New York C. & H. R. Co.* 95 N. Y.

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274, and *People v. Ah Lee*, 60 Cal. 85); but many others have gone a most surprising length beyond it. Among them is that of *Insurance Co. v. Mosley*, 8 Wall. 397. That decision and all of a kindred nature cannot, in my opinion, be maintained without doing violence to the law of evidence. It cannot be established by any system of logic that can be employed, that the statements and declarations of a party to a transaction, made after it has ended, are a part of it. It would be a moral impossibility. Take the case under consideration as an example. The respondent went onto the appellant's train of cars at The Dalles, and desired to be carried to Portland without paying fare. The appellant's conductor refused to carry him upon such terms. After the train started, and had gone a short distance, the respondent is found off the train, upon the ground, in an injured condition, and he alleges as a cause of action against the appellant that the conductor pushed him off. The appellant in its answer denies that the conductor pushed him off, and avers that he jumped off. This is the principal issue in the case. The affair, whatever it was, occurred aboard the train of cars; everything that transpired between the conductor and the respondent took place there and ended fully and completely when the respondent left the cars, whether he was pushed off or jumped off. When the respondent went from the cars to the ground and the train had passed on, the transaction between him and the conductor was as effectually terminated as it was a month later. In a very few minutes after the train had passed the spot where the respondent struck the ground three persons were attracted towards him, and naturally inquired how he came in that condition, and he answered, as an enraged person would be likely to under the circumstances, as before stated, and which implicated the conductor in a reckless and grievous wrong to him. Had the respondent complained of pain and suffering it would doubtless have been competent to have given that fact in evidence as proof of his injury; but to prove what he said the conductor did in order to attach the blame to the latter, and in his absence, is a distortion of the rule which permits the declarations of a party to be given in evidence. How can this state-

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ment be claimed to have been a part of the transaction between the respondent and the conductor when the affair was at an end, and the latter party probably a mile away at the time? I am unable to indorse any such view. The statement of the respondent at the time referred to, as to how he came off the cars, is as undoubtedly hearsay evidence as any narration of the affair he has given since that time. It occurs to me that courts at *nisi prius* would have but little difficulty in determining when the statements of a party in such cases were admissible as a part of the *res gestæ*, or were incompetent upon the grounds that they were only hearsay, if they would consider whether the transaction to which they related was continuing when they were made, or terminated at the time, and make that the test of the matter; and I believe that much of the embarrassment they labor under in applying the rule in such cases has arisen in consequence of an attempt that has frequently been made to stretch the *res gestæ* doctrine to an unnatural extent in order to suit some supposed meritorious case, and which has led to the great diversity of decisions and confusion of the law upon that subject.

The rule is very properly stated in *Williams v. Bowdon*, 1 Swan, 282, in the following language: "The declarations are evidence because they are part of the thing *doing*; if, therefore, the thing shall have been *done* and *concluded*, declarations then made are not evidence." This is in consonance with the rule as declared in the provision of the Oregon statute before referred to; but the legislatures of some of the other States have, as I view it, authorized its extension. It is declared by statute in the State of Georgia that "declarations accompanying an act, or so nearly connected therewith in time as to be free from all suspicion of device or after-thought, are admissible in evidence as part of *res gestæ*." (Code Ga. 1873, § 3773.) Under a provision of that character a declaration made after the transaction might be admissible; but the rule here is more restricted, and the declaration was improperly admitted. This disposes of the case, and it would be unnecessary to say anything more if it did not have to go back for a new trial; but, as it has to take that course, it becomes our duty to pass upon other questions assigned as error.

The two instructions asked for by the appellant's counsel, viz.: "(1) The burden of proving that the train belonged to the defendant is on the plaintiff; this must be shown by proof, and if not proved the defendant is entitled to a verdict, whether the plaintiff was put off the train or not. (2) If the train belonged to the Northern Pacific Railroad Company, the mere fact that the conductor was paid by the Oregon Railway & Navigation Company would not be sufficient to charge the defendant with the consequences of this injury";—were properly denied by the court. The ownership of the train was not important; the material question was, which of the two companies was using it at the time. If it were being run by the appellant in its business at the time the affair happened, the liability would attach to that company, if any such liability were created. The conductor may have been the servant of the appellant and employed in its business, although the train—that is, the property interest in it—may have belonged to the Northern Pacific Railroad; the train may have belonged to the latter company, but not been under its control at the time.

The second instruction asked for, which is above stated, may be true as an abstract proposition, but it had no sufficient relevancy to the case. The real question before the jury was, whose servant was the conductor when the affair took place? That he was paid wages by the appellant was some evidence that he was its servant at the time, and proof that the Northern Pacific Railroad Company owned the train, doubtless tended, in a measure, to show that it had the management and control of it when the occurrence happened; but the question was not of such a nature as to require the proof of it to be left to inference. The railroad was admitted to belong to the appellant; the conductor received his pay from appellant, and, presumably, the train was at the time being used in the appellant's business. In order to rebut this presumption the appellant should have proved by direct testimony that the other company was using the road-bed and running the train in its own business and for its own use. If the appellant's counsel had asked the court to instruct the jury that "if the train belonged to the Northern Pacific

Railroad Company, and at the time of the occurrence of the affair was in the use and employment of that company, under a contract for the temporary use of the appellant's road-bed, the mere fact that the conductor was paid by the appellant would not be sufficient to charge appellant with the consequences of the injury," he would have been entitled to have had it given, if there was any evidence before the jury tending to prove the fact; but in its present form it is too indefinite. Besides, the evidence did not justify the instruction. The payment of the conductor by the Oregon Railway and Navigation Company was not, under the evidence, "the mere fact" showing that it had no further connection with the train; there was the other fact before the jury, which was conceded, to wit, that said last-named company was the owner and proprietor of the road itself at the time the event happened.

The court, after charging the jury that it was conceded in the case that just previous to the accident the respondent was on board the train and attempting to ride to Portland thereon without paying fare, and that, under those circumstances, the agents of the company had a right to put him off if he refused to pay such fare, using reasonable care and caution in so doing, and that if, in putting him off under such circumstances, the respondent was injured, without negligence or blame upon the part of the appellant, then it was not liable for such injury; but it was its duty to first stop the train, and then put the respondent off; and if the appellant, through its agent, put the respondent off while the train was still in motion, and thereby caused the injury, the appellant would be liable therefor; and that if the jury found that the injury to the respondent was caused by the negligence or wilful misconduct of the appellant, committed through its agent, and that the respondent did not contribute to it by his own negligence, they should find for the respondent, and that the measure of damages would be, (1) for the expense of procuring the necessary medical attendance, to an amount not exceeding \$150, the sum alleged; (2) for the necessary expense of securing care and nursing, to an amount not exceeding \$309; (3) for bodily suffering, impaired working capacity, mutilation,

and disfigurement necessarily resulting from the injury; (4) for such mental suffering, apprehension, and anxiety as necessarily result from the injury, proceeded to instruct them, as a fifth item of damages, that if they should find from the evidence that the injury was malicious and wilful, or was caused by gross and wanton negligence, amounting to a total disregard of all social obligations, they would allow such sum as they would deem just and proper by way of punishment, and to deter others from such malicious and grossly and wantonly negligent acts in the future.

This last instruction was excepted to by the appellant's counsel, and it becomes our duty, as before indicated, to consider its correctness. It has in many instances been seriously questioned whether exemplary or punitive damages could properly be allowed in any private action. It would be extremely difficult, if not impossible, to give any good reason for such allowance, since the rule giving actual damages has been so liberally construed; but however that may be, it seems to have attached itself to our jurisprudence, and we are made recipients of its benefits and compelled to endure the hardships it imposes. However, I am opposed to extending the rule to cases to which it was never intended to apply, and would work injustice if the application were enforced. When the conduct of a person has been wilful, malicious, and wanton or reckless, and an injury has resulted to another in consequence of it, a jury might, with a semblance of reason, in an action to recover damages for such injury, assess something more than a mere compensatory sum therefor. That course, doubtless, would have a salutary effect in two respects; would visit the wrong-doer with wholesome punishment, and afford an example calculated to deter others from the commission of malevolent acts; but to attempt to extend the doctrine so as to visit the punishment upon innocent parties is, to my mind, unreasonable and unjust. I cannot see any principle upon which an employer, whether a natural or artificial person, can be made liable for the acts of his or its servant, beyond compensatory damages, unless the employer directed the doing of the act, or ratified it after it was done. In the case at bar the railroad company had been guilty of no

wanton or reckless act in the premises, whatever its conductor may have done; then why should it be punished? It is made liable for damages by the acts of its conductor, by reason of the duty it owes to the public. It has impliedly stipulated to observe certain duties and obligations, among them that it will transport passengers upon its train of cars safely and with reasonable dispatch, and that it will insure them proper treatment while in transit; and its duty and obligation may be violated through the acts of its employees. The act of the conductor, whether it be negligent, malicious, or reckless, will effect such violation the same in the one case as in the other. Should the conductor wantonly and cruelly mistreat a passenger, the company is made liable, not strictly for the act of the conductor, but for the reason that the company has failed to perform the duty it undertook, and the obligation it tacitly agreed to observe.

The acts of the conductor in the present case may have been so malicious and reckless as to indicate a depraved mind, and if such were the fact he ought to be punished for his wickedness; but by what rule of consistency can that punishment be inflicted upon the company? It did not obligate itself that it would not engage the services of anyone who would never display malice or exhibit recklessness, and it should not be made answerable for the sins of the conductor, except so far as they effected a breach of its contract before referred to. It is claimed, however, in the decisions of the courts, which hold that a railroad company is liable to exemplary or punitive damages, that the conductor of a train of cars is *pro hac vice* to be regarded the company itself; but this certainly is only a fiction of law. The fact that the company acts through agents in the transaction of its business is no more peculiar than where a natural person transacts his business through agents. The conductor usually has no pecuniary interest in the company beyond the stipend he receives for his services; he is not punished by the judgment against the company, whatever may be the amount of it. Corporations acquire their vitality by subscription for its capital stock. In this State one half thereof must be subscribed before it is allowed to engage in the business proposed in its articles,

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then the stockholders have a meeting, and choose directors, who thereafter manage its affairs. The pecuniary interest, the real substance of the corporation, is represented by its stock; its entire assets belong to the owners of the stock. They may be persons in moderate circumstances, who have invested their surplus earnings in the purchase of the stock, relying upon dividends to be realized therefrom. It is the stockholders who are affected injuriously by a judgment against the corporation, and who are punished when exemplary damages are awarded in the action, and if there is any justice in a rule which allows it in such a case, I am apprehensive that I shall never be able to discover it. Different views are entertained upon the question by courts in the different States, and while those of quite a number of them have held that such damages were allowable against a corporation for the acts of its agents, yet those of a very respectable number of the other of the States have maintained to the contrary. I think the rule upon the subject laid down in *Cleghorn v. New York Cent. & H. R. R. Co.* 56 N. Y. 44, the correct one, which makes the master liable for such damages when he is chargeable with gross neglect in the employment or retention in his service of an incompetent servant, knowing at the time of his unsuitability, or that he authorized or ratified the act of the servant in the particular case. The question as to whether the complaint is sufficient to permit the recovery of that character of damages in the case need not, under the view taken of the last point, be decided. It will not be amiss, however, to suggest that, in order to recover exemplary damages in any case, it must appear from the complaint, either by direct averment or from necessary inference, that the act occasioning the damages was done maliciously, or was the result of the wilful misconduct of the defendant, or that reckless indifference to the rights of others which is equivalent to an intentional violation of them.

The judgment appealed from is reversed, and the case remanded to the court below for a new trial.

LORD, J., concurs, except as to the last point discussed.

WALDO, C. J., dissented.

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[Filed June 25, 1885.]

PRISCILLA PARKER v. D. W. METZGER AND
EMMA METZGER.

TITLE—ADVERSE POSSESSION—STATUTE OF LIMITATIONS.—Adverse possession of real estate for the period prescribed by the Statute of Limitations vests a perfect title in the possessor as against the former holder of the title and all the world, and he is entitled to all remedies which are incident to possession under written titles.

MULTNOMAH COUNTY. Defendants appeal. Affirmed.

The facts are stated in the opinion.

O. F. Paxton, for Appellants.*W. T. Burney*, for Respondent.

LORD, J.—The substance of the facts as found by the referee, and out of which the main contention arises, are: That on or prior to the 15th day of November, 1865, the plaintiff owned and was in possession of, as a part of her portion of the donation land claim of Davis Duvall and wife, the N. E. quarter of the N. E. quarter of section 15, township 1 S., range 3 E., in Multnomah County, Oregon; that upon said date the plaintiff, then Priscilla Duvall, joined with her husband, Davis Duvall, in a conveyance of land in which said forty-acre tract, the land in dispute, together with other property, was deeded to one Tomlinson; that the said forty-acre tract was included in said conveyance by mistake of both parties, the intention of all parties being to convey only the land of Davis Duvall, and that the plaintiff joined in said deed solely for the purpose of barring her dower, the intention being to further vest in said Tomlinson the W. half of the N. W. quarter of said N. E. quarter section, which he had purchased, and by similar mistake the said twenty-acre tract was not so conveyed; that no consideration was paid plaintiff or her said husband for said forty-acre tract deeded to Tomlinson, and that said twenty-acre tract was occupied by Tomlinson thereafter, and has not been in the occupation of plaintiff since said conveyance, and the said mistake was

12	407
14	363
19	210
7*	518
12*	930
24*	459

12	407
27	80

12	407
138	33

12	407
86	181
136	258

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not discovered by plaintiff, or anyone, until about the year 1874; that in July, 1874, the said Tomlinson died, leaving minor children surviving him, none of whom are of age; that on the 9th day of May, 1882, a guardian's deed was made to the defendant Metzger of said premises, under a sale previously made by the guardian of said minors, under an order of the county court, and the said guardian's deed was placed upon record before the commencement of this suit; that the said defendant Metzger had actual notice of the claim of plaintiff to said land before purchasing at said guardian's sale, and that the plaintiff is the owner as to said defendants of said real estate, and that the defendants have no right, title, or interest therein or thereto; that from and after said conveyance to said Tomlinson the plaintiff and her husband continued to cultivate said portion of said forty-acre tract lying within her inclosure, and the plaintiff has continued in the occupation and cultivation thereof up to the present time, and has cut timber and sold timber from said forty-acre tract within four or five years after said conveyance was made; that all of said acts of ownership of said land by the plaintiff were done under the claim of ownership of all of said land adversely to all persons, and the said acts and the claim of ownership were open and notorious, and were well known to said Tomlinson during his lifetime.

These facts as found, we think, are substantially sustained by the evidence. The suit is based upon two grounds, either of which, it is contended, entitles the plaintiff to the relief prayed for. Upon the first ground the plaintiff claims the legal title to the forty-acre tract of land in dispute by reason of adverse possession under a claim of title, and insists that being in possession of the premises, and invested with the title by operation of the Statute of Limitations, and the defendants claiming some interest therein adverse to her, she is entitled to the relief sought. On the other hand, it is contended that the Statute of Limitations does not vest the title in the person who holds the lands under it; that it affects the remedy only, and not the right; and that plaintiff, not having the legal title, has no standing ground upon which she can maintain this suit. In

support of this position we are referred to *Goodwin v. Morris*, 9 Oreg. 322, and *Myer v. Beal*, 5 Oreg. 130. But neither of these cases were actions or suits concerning title to real property; and as to actions of tort or upon contract, as decided in those cases, the law seems to be that the statute bars the remedy only. But the question here directly is, whether our statute bars the right, and vests the title in the party who brings himself within its provisions. If it does, then it is conceded that the suit may be maintained. This question has been very ably and thoroughly examined and answered by Mr. Justice Sawyer in *Arrington v. Liscom*, 34 Cal. 380. In that case the suit was, as here, to quiet title; and after an elaborate review of the authorities, the result reached was that adverse possession for the full period limited by the statute confers title, and that it is such title as entitles the holder to all the remedies to quiet his possession that are incident to possession under written titles. In the course of his opinion he said: "Some recent statutes provide in express terms that adverse possession for the time prescribed shall extinguish adverse titles and vest the possessor with the fee. Ours contains no such express provision; but is not that the effect of our statute when properly construed? Angell says, in the language of Mr. Chancellor Harper, in *Drayton v. Marshall*, 1 Rice Eq. 385: 'The belief is that no case can be put in which a private individual knows that another person claims and is in the actual enjoyment of land which belongs to him, and neglects to prosecute his rights at law, when there is nothing to prevent his doing so, that he will not be barred by the Statute of Limitations.' (Ang. Lim. 5th ed. 374, § 381.) And Angell further says: 'It is also unquestionable that where the land has been held, under a claim to the fee, for the time prescribed by the statute, and an entry is made by the party who has the written title, such party may be dispossessed by an ejectment brought by him who has so held and claimed.' This was so held in *Jackson v. Oltz*, 8 Wend. 440. The lessor of the plaintiff had been in possession for the period prescribed by the statute, claiming title under a patent. Defendants afterwards entered and held under a title which had

been judicially determined to be valid. The action was brought by the plaintiffs, relying on the title acquired by adverse possession, against the defendants holding such paper title, and a recovery had. The court say: 'If the possession was adverse, and had been so for more than twenty years, as it had in this case, then the possession ripened into a title, and the plaintiff must recover against the defendant, though the paper title to the fifty acres is, in reality, not in him.'

"The same principle is recognized in *Jackson v. Dieffendorf*, 3 Johns. 269. And in *Jackson v. Rightmyre*, 16 Johns. 314, Mr. Chancellor Kent says that showing a possession of thirty-eight years under a claim of right 'was showing an absolute right of possession sufficient to toll an entry.'

"Our Statute of Limitations relating to real estate is copied from the statute of New York, with but slight verbal changes, and we are not aware of any provision in the statute of New York which would affect the construction on this point. In *Bradstreet v. Huntington*, 5 Peters, 438, Mr. Justice Johnson says 'that an adverse possession, when it actually exists, may be set up against any title whatsoever, either *to make out a title* under the act of limitations, or to show the nullity of a conveyance executed by one out of possession. On the first two of the propositions there can be no doubt, and none has been expressed.' And in *Drayton v. Marshall*, *supra*, Mr. Chancellor Harper says: 'The time then required to *mature a title* by the Statute of Limitations had run out more than five times before the filing of this bill.' And again: 'But if, by the statute, the defendants have acquired a title to the fee, they can of course have no right of redemption against themselves. This must be merged or extinguished in the fee.' These remarks all go upon the idea that adverse possession for the time prescribed confers upon the possessor some interest, some positive right; that it affords him something more than a shield; in short, invests him with title. In *LeRoy v. Rogers*, 30 Cal. 229, we said: "*Rogers' title, thus acquired by adverse possession*, the claimants under the patent having a right of action and being under no disability, could not be impaired by an entry by them, claiming

under the patent, unless made in pursuance of a judgment to which Rogers was a party or privy.' So in *Taylor v. Horde*, 1 Burr. 119, Lord Mansfield said: 'Twenty years' adverse possession is a *positive title* to the defendant. It is not a *bar to the action or remedy only, but it takes away the right of possession.*' To the same effect are *Stokes v. Berry*, 2 Salk. 421, and *Pederick v. Searle*, 5 Serg. & R. 239.

"In *Leffingwell v. Warren*, 2 Black, 605, the Supreme Court of the United States says: 'The lapse of time limited by such statutes *not only bars the remedy, but it extinguishes the right, and vests a perfect title in the adverse holder.*' So in *School District v. Benson*, 31 Me. 384, the court say: 'A legal title is equally valid, when once acquired, whether it be by disseizin or by deed; it vests the fee-simple, although the mode of proof, when adduced to establish it, may differ. . . . When the title is in controversy, it is to be shown by legal proof, and a continuous disseizin for twenty years is as effectual for that purpose as a deed duly executed. The title is created by the existence of the facts, and not by an exhibition of them in evidence. An open, notorious, exclusive, and adverse possession for twenty years would operate to convey a complete title to the plaintiffs, as much so as any written conveyance. And such title is not only an interest in the land, but it is one of the highest character—the absolute dominion over it—and the appropriate mode of conveying it is by deed.' (See also *Barwick v. Thompson*, 7 Term Rep. 488; *Beckford v. Wade*, 17 Ves. Jr. 87; *Moore v. Luce*, 29 Pa. St. 260; *Lessee of Thompson's Heirs v. Green*, 4 Ohio St. 223; *Newcombe v. Leavitt*, 22 Ala. 631; *Chiles v. Jones*, 7 Dana, 528.) And again: 'Whatever may be true of personal contracts, it certainly cannot be said with reference to realty, in view of the authorities cited, that the statute only takes away the remedy, or that a right, a title, is not practically extinguished as to one party and acquired by another. The five years' adverse possession, practically, at least, is conclusive evidence of title in the possessor, and if conclusive evidence of title in him, it must be as conclusive evidence of no title in the other. What is the legal definition of title to land? A title is thus defined by Sir

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Edward Coke: '*Titulus est justa causa possidendi id quod nostrum est* ; or it is the means whereby the owner of land has just possession of his property.''' (2 Blacks. Com. 195.) If this definition presents the true idea of title, then, when a party's means of obtaining possession, or maintaining possession when obtained, have been extinguished by an adverse possession, it would seem to follow that his title is effectually and substantially extinguished in fact, whatever his condition theoretically may be. And the party who has acquired an absolute right of possession, which will not only shield him in his possession against the attacks of all the world, but when ousted, will restore him to and protect him in his just possession, even against the party having the written title, would seem to have a substantial title.

We can see no reason why, for all practical purposes, such a party's title should not be regarded, both in law and equity, as good as though he also had a perfect written title; and we are dealing with practical and not merely theoretical questions. If a party's right of possession has become absolute, has by long adverse possession ripened into what may as well and as properly, for practical purposes, be called title as anything else, so that he can maintain his possession, or recover it when ousted, or maintain all actions for injuries to it against the party having the written title, in all respects in the same manner, and to the same extent as against parties who never were other than entire strangers to the premises; if the party having the written title has lost, by the adverse possession, all means of recovering or protecting possession when acquired without action, and all means of establishing or maintaining any right against the adverse possessor, we can perceive no good reason why such adverse possessor should be annoyed by pretended claims, or have the value of his possession diminished by an apparent title which has lost its vitality. We see no good reason why the party whose adverse possession has practically ripened into a title, should not be entitled to all the remedies to quiet his possession that are incident to possessions under written titles, which are in law and equity no more efficacious to protect the

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owners in the actual enjoyment of their possessions under them. Statutes of Limitation are said to be statutes of repose. If so, they should be so construed and administered with respect to cases falling within their purview as to afford complete, not merely partial, repose.

To the same effect is the case of *Alexander v. Pendleton*, 8 Cranch, 462. The action was by the party in adverse possession against the other claimants out of possession, and a decree establishing title, and granting affirmative relief quieting it, was rendered, based upon a title acquired by adverse possession. Mr. Chief Justice Marshall said: "The appellant's title being secured by possession of more than fifty years, is unquestionably good, and it is proper that the doubts that hang over it should be removed." The statute under which this was done only purported, by its terms, to bar the remedy; it did not provide that the title of the owner should be extinguished, or that the possessor should be invested with a title. In *Sherman v. Kane*, 86 N. Y. 64, it is held, where title to land has been acquired by twenty years' adverse possession, it is equally as strong as one obtained by grant, and is not forfeited by an intermission of the actual occupation thereafter. The court say: "If the title had been acquired by grant, such an act could not affect or invalidate it; and as title by adverse possession is equally strong as one obtained by grant, no reason exists for making an exception against the latter. A perfect answer, also, to the position of the learned counsel is that the city had title by adverse possession, and that title continued after it had become perfect and complete, without regard to the interruption of the actual occupation or possession." It thus appears that adverse possession for the time prescribed vests a perfect title in the possessor as against the former holder of the title and all the world, and that he is entitled to all the remedies at law or in equity which are incident to possession under written titles. (See also *Jones v. Brandon*, 59 Miss. 585; *Hinchman v. Whetstone*, 23 Ill. 189; 3 Wait Act. and Def. 19; *Cannon v. Stockmon*, 36 Cal. 541.) It is hardly necessary to review in detail the testimony. It shows satisfactorily to us that the possession of the plaintiff has been

Argument for Respondent.

adverse, exclusive, unbroken, open, and notorious. She has always claimed to be the owner, and as such she has paid the taxes on this land, erected a building on it, set out fruit trees on it, grubbed and cleared part of it, seeded it with timothy and clover, cut hay off it, made and changed fences on it, used firewood from it, sold shingles and rail timber off it, some seasons cultivated it, and in all these various ways actually possessed and exercised acts of ownership over it.

Upon the second point, upon which it is claimed the plaintiff is equally entitled to the relief asked, the conclusion above reached renders it unnecessary to pass further than to remark that the case cited in *School District v. Wrabeck*, 31 Minn. 77, seems to sustain the view urged by counsel for plaintiff.

The decree of the court below must be affirmed.

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15 90
16 491
7* 97
9* 565
13* 780
19* 649

[Filed May 19, 1885.]

IN RE ESTATE OF GOLDSMITH ET AL., INSOLVENTS.

INSOLVENCY PROCEEDINGS — JURISDICTION IN. — In the exercise of the supervisory control over assignees of insolvents conferred upon Circuit Courts by the Act of October 18, 1878, such courts exercise only a special statutory authority, and in the exercise thereof stand upon the same footing as courts of limited and inferior jurisdiction.

IN. — APPEAL. — No appeal lies from an order of such court upon a petition for the removal of an assignee of an insolvent.

MULTNOMAH COUNTY. Petition to remove assignee. Petitioner appeals. Appeal dismissed.

The facts are stated in the opinion.

Henry Ach, for Appellant.

Joseph Simon, for Respondent.

Under the assignment law of this State, if the assignee is found guilty of wasting or misapplying the trust estate, it is discretionary with the court whether to remove the assignee or require additional security. The Supreme Court will not

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review the exercise of such discretion, unless it appear on the face of the record that there was a palpable and gross abuse of the discretion. (*Need's Appeal*, 70 Pa. St. 113; *Bowers' Appeal*, 84 Pa. St. 311; *In re Anderson*, 17 N. J. Eq. 536.) The appeal in this proceeding is taken from an interlocutory order, and even if an appeal would lie from an assignment proceeding, it could not be taken until the case was finally disposed of. There must first be a judgment in the case, or some final order which in effect prevents a judgment and terminates the entire proceeding. (*Craven v. Chambers*, 55 Ind. 5; *Racine & M. R. R. Co. v. Farmers' L. & T. Co.* 70 Ill. 249; *Thiebaud v. Dufour*, 57 Ind. 598; *Wood v. Wood*, 51 Ind. 141.) The original testimony forms no part of the transcript and ought not to be considered by this court. It is only where the appeal is taken from a decree that the evidence is filed in this court and made a part of the transcript and the suit tried anew. (§§ 531, 533, Civ. Code; *Oeborn v. Graves*, 11 Oreg. 526.)

THAYER, J.—This is an appeal upon the part of White, Goldsmith & Co., creditors of said estate, from an order of the Circuit Court for the county of Multnomah, refusing to remove Rudolph Goldsmith, the assignee of said insolvent debtors, under the act of the legislative assembly of the State to secure creditors a just division of the estates of debtors who convey to assignees for their benefit, approved October 18, 1878. The appellants, on the 21st day of October, 1884, filed a petition in the said Circuit Court, in which they alleged, in substance, that they were creditors of said debtors; that said assignee had failed to file such bond as the law contemplated; that he was a brother of one of the debtors; that he had placed under their control and in their possession the assets of the estate, had paid them large salaries, and did not devote any personal attention to the management of the estate; that the father and brother of one of the debtors, Julius Goldsmith, pretended to have large claims against the estate, which the petitioners desired to contest; that immediately preceding the attachment of the property of the debtors, which caused the making of the assignment, the assignee

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advised and assisted in securing to the wife of one of the debtors, S. M. Cooper, a claim against the firm of \$3,000, and that the assignee had failed to account for \$1,000 in money, alleged to have been on hand at the date of the assignment.

Upon filing the petition an order was made by the said Circuit Court requiring the assignee to show cause why he should not be removed as assignee of the said estate, whereupon the assignee filed an answer controverting the allegations of the petition, excepting his relationship as the brother to Julius Goldsmith, and the employment of the debtors to assist in conducting the business; denying, however, that he paid them more than a reasonable salary, and claiming that their employment was necessary. The proceeding was then referred to a referee to take the testimony of the parties, and report it with his findings of fact and law. In accordance therewith, the referee took a large amount of testimony concerning the matters charged in the said petition, upon which he made a number of findings of fact, generally in support thereof, and found, as a matter of law, that the assignee should be removed. The assignee filed exceptions to the report, which were heard before the said court, and were sustained, and the report set aside. The court, however, required the assignee to give additional security, which he complied with.

The proceeding has been brought to this court for review upon the evidence taken by the referee. The appellant's counsel has presented it with much force, and has submitted cogent reasons for the removal of the assignee; but he was met at the entrance here with an objection to the jurisdiction of this tribunal to hear and determine the matter, which I apprehend is insuperable. The objection is that the appointment or removal of an assignee is a matter of discretion; that if the assignee had been found guilty of wasting or misapplying the estate, it would have been discretionary with the court below, under the insolvent act, to remove him or require additional security; and that this court will not review the exercise of such discretion unless it appear that it has been abused. It is also objected that the appeal is taken from a mere interlocutory order, and that it

could in no event be taken until the case was finally disposed of by some kind of judgment or final order, which in effect terminated the entire proceeding; and it was finally insisted upon by the respondent's counsel that the jurisdiction conferred by the said insolvent act upon Circuit Courts was limited to those courts. I am of the opinion that the last objection is fatal, whatever might be our conclusions as to the former ones.

The insolvent act referred to vests in the Circuit Court and the judge thereof a supervisory control over assignees therein referred to, and in case of the death of such assignee, or his failure to qualify, authorizes said court or judge to appoint an assignee, and in certain cases to require additional security, and to remove the assignee; but it does not, either by express language or necessary implication, give the right of appeal to this court in any case. The jurisdiction therein granted is only a special statutory authority, to be exercised over a subject not within the ordinary jurisdiction of courts of justice. It is well settled that, although such kind of authority is conferred upon a court of general jurisdiction, yet in the exercise thereof it stands upon the same footing with a court of limited and inferior jurisdiction. (*Orepps v. Durden*, 1 Smith Lead. Cas. 6th ed. 1011; *Galpin v. Page*, 18 Wall. 371.) Hence it may be inferred beyond question that jurisdiction of that character cannot properly be extended by intendment, and that it necessarily will be confined to the express terms of the act by which it is granted.

The following language of Chief Justice Spencer, *In the Matter of Beckman Street*, 20 Johns. 270, illustrates this view:—

“The powers possessed by this court in appointing commissioners, in reviewing their report, in referring it back to the same commissioners, or substituting new ones, and in finally confirming their report, are derived wholly from the statute. None of these powers exist independently of the legislative delegation of authority; and they are not incident to our judicial duties. It might be a question how far the legislature can impose such duties upon the judges; but it does not admit of a doubt that, if we do consent to act, we act under a limited and circumscribed authority; and our only powers to act being

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derived from the statute, we possess no powers but such as are expressly given, and those powers must be exercised in the manner designated by the act. It is true, we act collectively and in term time, and a majority control the proceedings; but we act as commissioners, and in the same way and manner as we used individually to do under the insolvent act. The statute is our guide, and we must proceed by the rules and in the manner it prescribes. The general powers and jurisdiction of this court as regards the application now before us cannot be brought into exercise. They do not apply to such a subject."

In the Matter of Mount Morris Square, 2 Hill, 14, the same doctrine is declared. If, therefore, the power vested in the courts by virtue of the Insolvent Act of October 18, 1878, in proceedings had in conformity to its provisions, extends no further than the express provisions of the act, then this court has no right to entertain jurisdiction of the said appeal, for the obvious reason that no such right is therein conferred. It is analogous to the jurisdiction in bankruptcy specially delegated to the lord chancellor of England, committed to him as keeper of the great seal. In the discharge of that jurisdiction he exercised all the powers of his court, but no appeal lay from his decisions in such cases, because no law had been passed authorizing such appeal. (*Ex parte Cowan*, 3 Barn. & Ald. 123.) The general statutes of this State only authorize an appeal from a judgment in an action or decree in a suit. The determination in this proceeding is neither, and it will require a special enactment to give an appeal therefrom. This appeal must therefore be dismissed.

LORD, J., concurred.

On a petition for a rehearing the following additional opinion was delivered October 13, 1885:—

THAYER, J.—After hearing the appeal herein, the court was of the opinion that it had no jurisdiction to review the decision of the Circuit Court from which the appeal was taken, and so announced; but the appellant's counsel filed a petition

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for rehearing, and insists very strongly that the court was in error. He contends that the proceeding in the Circuit Court was only the exercise of ordinary equity jurisdiction, and that its decision was a decree from which an appeal will lie to this court under the provisions of the statute regulating appeals. If the proceeding had been a suit to remove the assignee, brought in the ordinary way, the counsel would, no doubt, be correct. When the jurisdiction of a court is called into exercise by an action or suit in the regular mode of proceeding, the right of appeal from the judgment or decree rendered therein, as provided by general statute, will, no doubt, attach, whether such jurisdiction is derived from the common law, or has been conferred by statutory enactment. The decision of the Supreme Court of California (*Sharon v. Sharon*, 6 West C. Rep. 856), to which our attention has been called, that an action of divorce was within the appellate jurisdiction of that court under the former Constitution of that State, could, I think, have been maintained upon this ground, whether such action was in the nature of a case in equity or not. The proceeding, as I understand, was in the ordinary mode of an action in that State, was commenced and prosecuted in the same manner, and differed from other actions only in the nature of the relief sought. This case is not an action or suit; it is a mere special statutory proceeding under the act of the legislative assembly, "to secure creditors a just division of the estate of debtors who convey to assignees for the benefit of creditors." The clause under which the proceeding was had provides that the Circuit Court or judge may, in certain cases, appoint an assignee. It says: "If on complaint before the court or judge it should be made to appear that any assignee is guilty of wasting or misapplying the trust estate, said court or judge may direct and require additional security, and may remove such assignee, and may appoint others instead." Such a complaint was made to the Circuit Court in this case, and it refused to remove the assignee, but did require him to give additional security, and it is from that ruling that the appeal was taken. The proceeding was had before the court, but might just as well have been had before the judge. It was a

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mere summary affair, except so far as the parties attempted to dignify it by making up an issue, having a referee appointed, and by going through with all the formality of taking depositions and having a finding of facts and law and hearing before the court. Such a prolix affair could never have been contemplated by the legislative assembly when it passed the act. It would consume too much of the estate in fees and expenses, and giving the right of appeal to this court would delay its settlement beyond all reasonable forbearance. At all events, I am satisfied that the right to such an appeal does not exist unless especially given. I am of the opinion that where a court or judge is directed by statute to exercise a particular function in a manner different entirely from the ordinary mode of procedure by action or suit, no appeal to this court from the determination of such court or judge will lie unless provided for in the act itself, for the reason that the general statutes of this State, regulating appeals to this court, do not, in my judgment, extend to such a case, and no such right exists except by force of a statute. (*Wilcox v. Saunders*, 4 Neb. 572.) In *Morgan v. Thornhill*, 11 Wall. 65, an appeal was taken from a decree of the Circuit Court of the United States for the district of Louisiana to the Supreme Court, made in the exercise of its supervisory jurisdiction, conferred by the Bankrupt Act of the 2d of March, 1867. A motion was made in the Supreme Court to dismiss the appeal, upon the grounds that the decree was rendered by the circuit judge by virtue of the special power conferred on the Circuit Court, on the judge thereof, to exercise a general superintendence and jurisdiction of all cases and questions arising under said bankrupt act, and that from such class of decrees no appeal would lie. The Supreme Court, in referring to that class of jurisdiction conferred on the Circuit Courts, said that the act made no provision for an appeal to that court in any such case, whether the case or question presented or involved in the bill, petition, or other proper process was submitted to the court or to a justice thereof, or whether the case or question was heard or determined in vacation or in term time, and dismissed the appeal. The question there determined was analogous in prin-

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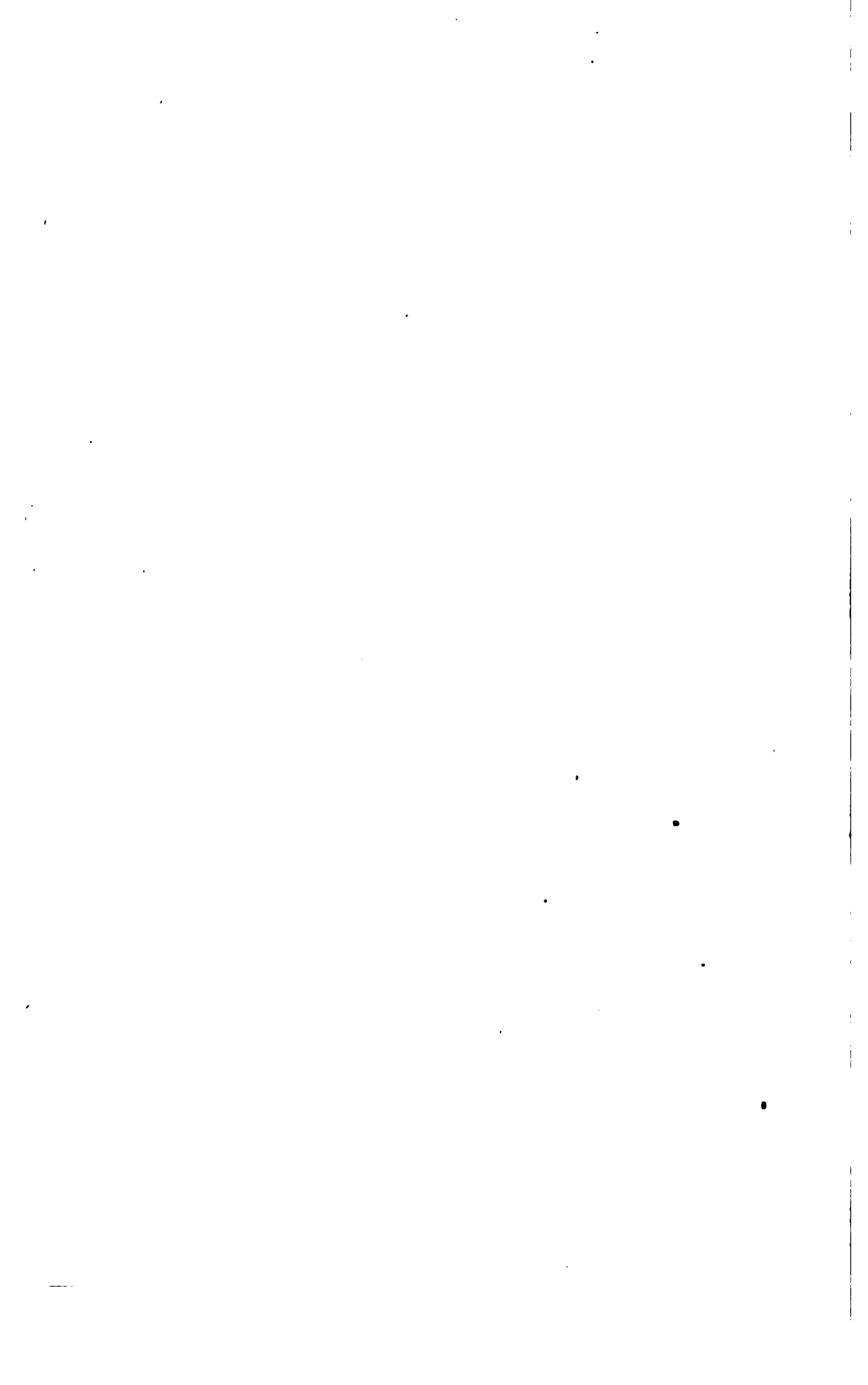
ciple to the one under consideration, and I can see no good reason for changing the former view expressed.

It was held in *Sharon v. Sharon*, before referred to, that the decree for alimony granted in the action of divorce was in the nature of a final judgment or order, and the appellant's counsel may claim that that is an authority in favor of his position that the refusal of the Circuit Court to remove the assignee was a final order. There is no similarity between the two cases. But conceding that the latter order was a final order, it would not follow that an appeal could be taken therefrom. It would not be "an order affecting a substantial right, and which, in effect, determined the action or suit so as to prevent a judgment or decree therein," or "a final order affecting a substantial right made in a proceeding after judgment or decree." (Civ. Code, § 525.)

The petition for rehearing should, therefore, be denied, and it is so ordered.

LORD, J., concurred.

OCTOBER TERM, 1885.



CASES

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF

OREGON.

OCTOBER TERM, 1885.

[Filed October 12, 1885.]

GEO. A. DAVIS v. T. B. WAIT.

BILL OF EXCHANGE—CONSIDERATION—FAILURE OF.—Partial failure of consideration may be set up to an action on a bill of exchange, and the defendant may recoup his damages though they be unliquidated.

ID.—INDORSEE WITH NOTICE.—The right of an indorsee with notice of failure of consideration cannot be superior to that of his indorser.

PLEADING—WAIVER OF DEFECT IN.—A defective statement of facts in a pleading is waived by joining issue upon them.

MARION COUNTY. Defendant appeals. Reversed and new trial ordered.

Action on a bill of exchange indorsed before maturity, drawn on the defendant July 23, 1883, at nine months, by Fish Bros., of Racine, Wisconsin, and accepted by defendant. Defense, partial failure of consideration, known to the plaintiff when he took the draft, pleaded as follows: "That the plaintiff before he claims to have received said draft by indorsement had notice and knowledge of the terms of the contract and agreement

Argument for Appellant.

between Fish Bros. & Co. and the defendant, and of its violation by the former in the respect hereinbefore set out." This allegation was denied in the reply.

The court instructed the jury that "the plaintiff having notice of said claim of damages and defects before he purchased the bill, if he did purchase it, would not affect his right to recover, provided he purchased it before it became due. There being no allegation of fraud in obtaining the bill, the question of notice is not material, provided the bill was purchased for value, in the usual course of business, before it became due." Verdict for plaintiff.

William M. Ramsey, for Appellant.

If the plaintiff at the time he received the bill had notice of the consideration for which it was given, and that it had partially failed, he took it subject to all defenses existing against it in the hands of the drawers. (Story Promissory Notes, § 190; 1 Daniel Neg. Inst. § 789; Code, § 28, p. 110.) If the holder of a bill of exchange, the consideration for which was an executory contract, take it with knowledge of a breach of the contract by the drawee of the bill, he cannot recover. (1 Wait Action and Defenses, 608, 617; 1 Parsons Notes and Bills, p. 258; *Wagner v. Deidrich*, 50 Mo. 484; *Coffman v. Wilson*, 2 Met. (Ky.) 542; *Bowman v. Van Kuren*, 29 Wis. 218; *Davis v. McCreedy*, 17 N. Y. 230; *Croix v. Sibbetts*, 15 Pa. St. 238; 1 Field Lawyer's Briefs, § 632, and cases there cited.) If purchaser for value before maturity of a note has knowledge that the consideration has failed, he takes it subject to that defense. (*Rumsey v. Leek*, 5 Wend. 20, 21; *Herrick v. Carman*, 12 Johns. 159, 160; *Olmstead v. Stewart*, 13 Johns. 239, 240.) The title of the holder of a negotiable bill of exchange acquired before maturity, is not protected against prior equities of the antecedent parties to the bill when it was taken with knowledge of the equities. (*Goodman v. Simonds*, 20 How. 343; *Brown v. Spofford*, 95 U.-S. 474; 1 Daniel Neg. Inst. p. 645.) A partial failure of consideration is a good defense *pro tanto* to a note or bill in the hands of a person who took it

Argument for Respondent.

with notice, although founded on a claim for unliquidated damages. (*Withers v. Green*, 9 How. 214, 220.) A note or bill, received by a person with notice of any fact which would impeach it in the hands of the payee or drawee, is not "transferred in good faith" within the meaning of section 28 of the Civil Code. (2 Daniel Neg. Inst. pp. 645, 646.) The counterclaim mentioned in section 72 of page 120 of the Civil Code of Oregon is comprehensive in signification. It includes recoupment and set-off. It embraces all sorts of claims which a defendant may have against the plaintiff. (*Waterman Set-Off*, §§ 590, 598; *Xenia Branch Bank v. Lee*, 7 Abb. Pr. 379; *Gleason v. Moen*, 2 Duer, 638.)

Mark A. Fullerton, for Respondent.

Negotiable instruments, of the nature of this bill of exchange, are commercial paper in the strictest sense, and must ever be regarded as favored instruments, as well on account of their negotiable quality as their universal convenience in mercantile affairs. (*Collins v. Gilbert*, 94 U. S. 753.) A *bona fide* holder of a negotiable instrument for a valuable consideration, without notice of the facts which impeach its validity as between antecedent parties, if he takes it under due indorsement before the same becomes due, holds the title unaffected by these facts, and may recover thereon, although as between the antecedent parties the transaction may be without any legal validity. (*Swift v. Tyson*, 16 Peters, 1, 15; *Goodman v. Simonds*, 20 How. 344-364; *Gilbert v. Collins*, *supra*; 1 Parsons Contracts, p. 288, 7th ed. and cases cited.) Suspicion of defect of title, or knowledge of circumstances which would excite suspicion in the mind of a prudent man, or even gross negligence on the part of the taker at the time of the transfer, will not defeat his title. That result can only be produced by bad faith on his part. (*Hotchkiss v. National Bank*, 21 Wall. 354-359; *Murray v. Lardner*, 2 Wall. 110-121; *Seybel v. Currency Bank*, 54 N. Y. 288; *Shreeves v. Allen*, 79 Ill. 553; *McSparran v. Neeley*, 91 Pa. St. 17; *Frank v. Lilienfeld*, 33 Gratt. 377; Gen. Laws Oregon, p. 110, § 28; p. 523, § 55.) This, also, is the English rule. (*Goodman v.*

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Harvey, 4 Ad. & E. 870; *Uther v. Rich*, 10 Ad. & E. 784.) A party seeking relief from the payment of purchase money, on the ground of fraud, must distinctly allege fraud in the complaint, and relief on that ground will not be granted unless it be so distinctly alleged. (*Patton v. Taylor*, 7 How. 132-159; *Moore v. Green*, 19 How. 69-72; Bliss Code Pleading, § 211; *Pomeroy Remedies*, p. 730, § 687, 2d ed.; *Uther v. Rich*, 10 Ad. & E. 784.)

WALDO, C. J.—The answer set up a good defense of notice, and the court erred in the instruction which cut it off. Partial failure of consideration of a bill of exchange may be set up to an action on the bill, and the defendant may recoup his damages, though they be unliquidated. (*Withers v. Green*, 9 How. 224; *Stacy v. Kemp*, 97 Mass. 166; *Wyckoff v. Runyon*, 4 Vroom, 107.) If an indorsee take a bill with notice of the failure of consideration, his right to recover cannot be superior to that of his indorser. (*Herrick v. Carman*, 12 Johns. 159; 1 Par. Bills and Notes, 258.) Counsel for the plaintiff argued, however, that conceding error in the instruction, the defendant could not take advantage of it, because he had not properly alleged notice in his answer, in this, that he did not allege that the draft in suit arose out of the transaction on which the defendant founded his defense. The pleading is defective in the particular alleged, but the plaintiff waived the defect by taking issue on the facts alleged, as is shown in *White v. Spencer*, 14 N. Y. 247, and *Bank of Illinois v. Brady*, 3 McLean, 268. The judgment must be reversed, and a new trial ordered.

Judgment reversed.

Opinion of the Court—Lord, J.

[Filed October 21, 1885.]

WM. MACKEY ET AL. v. JOHN A. OLSEN.

CONTRACT OF SALE—BREACH OF—MEASURE OF DAMAGES.—In an action for breach of contract for the sale of "all the timber" on a certain tract of land "suitable for piling or railroad ties," and giving the purchaser a right of way to said timber, the measure of damages is the difference between the contract price and the market value of the timber standing at the time the cause of action arose, and it was error to allow evidence to show the cost of constructing a road to such timber.

APPEAL—REMISSION OF DAMAGES.—When the injury resulting from such error can, from the record, be segregated from the amount of the verdict, and plaintiff will remit such sum, the judgment will be affirmed for the balance; otherwise a new trial will be ordered.

BENTON COUNTY. Defendant appeals. Judgment affirmed upon plaintiffs consenting to remit the damages resulting from erroneous ruling of the trial court.

The facts are stated in the opinion.

John Burnett, and *John Kelsay*, for Appellant.

R. S. Strahan, and *J. R. Baldwin*, for Respondents.

LORD, J.—This is an action for damages based upon the breach of a written contract for the sale of standing timber, in which it is alleged, as the essential part of such contract, "that in consideration of one half cent per foot running measure, the party of the first part agrees to sell all the timber on his land near Newport that may be found suitable for piling or railroad ties, and give the right of way to said timber to the parties of the second part. And the parties of the second part agree to pay to the party of the first part one half cent per foot running measure for all timber on said land suitable for said road ties or piling, payments to be made on the delivery receipt and payment of the railroad company or other purchasers." It is further alleged that the market value of the timber is six cents per foot. In his answer the defendant denies this allegation, and alleges that the market value was not greater than the contract price, etc. Issue being joined, a trial was had which resulted in a verdict for the plaintiffs. The defendant appeals,

12	429
34	557
34	566
12	429
48	814

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and assigns among other grounds of error, as appears by the bill of exceptions, that the court erred in allowing the plaintiffs to prove the costs of constructing a road to get the standing timber mentioned in the complaint, for the reason, principally, that the measure of damages applicable to the case is the difference between the contract price and the market value of the timber standing. The defendant claims that the plaintiffs have no more right to make him pay for making the road to the timber than if they had gotten all the timber for which the contract provided, and then sued him for the cost of making the road to get it. Now it will be admitted that if the contract had been fully performed and completed, the road must have been left on the land, and no charge could be made for the expenses of constructing it. By their verdict for damages plaintiffs have got the equivalent of all the timber for which the contract provided, and the road is left on the land the same as if the contract had been performed, as indicated by the issue and the instructions of the court. The difference between the contract price and the market value of the timber standing at the time the cause of action arose was the measure of damages applicable to the case. It was error, therefore, to allow evidence to show the expense of constructing this road. The amount of this expense was sixty-five dollars; and we think the admission of this evidence worked an injury to the defendant. But as we are unable by the record to segregate the amount from the verdict, we have concluded that if the plaintiffs will remit this sum of sixty-five dollars, the judgment will be affirmed for the balance; otherwise a new trial must be ordered.

Argument for Respondent.

[Filed October 26, 1885.]

C. H. STEWART, ASSIGNEE, v. ISAAC McCLUNG.

EXEMPTION FROM EXECUTION—WEARING APPAREL.—A watch of moderate value may be exempt from execution as “necessary wearing apparel,” when it is made to appear that the watch and other articles reserved as wearing apparel do not exceed the amount limited by the statute. But in such case it lies with the party claiming the exemption to prove affirmatively the facts which establish his claim.

12 451
130 284

LINN COUNTY. Defendant appeals. Affirmed.

The facts are stated in the opinion.

Weatherford & Blackburn, for Appellant.

Under our statute every person is entitled to necessary wearing apparel to the value of one hundred dollars. (Code, § 279.) A watch is included in the words “necessary wearing apparel,” as used in exemption laws. (*In re Steele*, 8 Cent. L. J. 86; and see article on Common Law Exemptions, 9 Cent. L. J. 262; *Bumpus v. Maynard*, 38 Barb. 626; *Mack v. Parks*, 8 Gray, 517.) We do not claim that a watch is absolutely necessary for subsistence, nor are many other articles that have always been considered exempt under similar statutes; the word “necessary” has ever extended to things of convenience and comfort, and suitable to the condition of the person in society, and is not limited to things absolutely necessary for mere subsistence. (*In re Steele*, *supra*; *Montague v. Richardson*, 24 Conn. 338; *Garrett v. Patchin*, 29 Vt. 248.) If his wearing apparel exceeded the statutory limit, he would have the right to make such selection as he saw proper; but there is no evidence that it would exceed the limit. He claimed this watch as exempt, and the court held that a watch was not or could not be exempted as wearing apparel. If it is not provided in the insolvent act that it is not exempt, then the insolvent is entitled to the benefit of the exemption. (*Brooks v. Nichols*, 17 Mich. 38; *Moseley v. Anderson*, 40 Miss. 49.)

L. Flinn, and *H. H. Hewitt*, for Respondent.

Under section 3, page 37, Session Laws 1878, the title to all

Opinion of the Court—Lord, J.

the property of the assignor passed to the assignee upon the execution and delivery of the assignment. The assignment vested all the property of the assignor in the assignee. Section 3, p 37, Session Laws of 1878, expressly provides that such an assignment shall vest in the assignee all the property of the assignor, whether mentioned in the schedule or not. (*Moses v. Thomas*, 26 N. J. L. 124; *Van Waggoner v. Moses*, 26 N. J. L. 570.) If the assignor claimed any of the property as exempt from the operation of the assignment, it was his duty to claim and select it at the time of the assignment, and if he did not do it then, he waived his right to do so afterwards under section 279 of the Code. (*White v. Thompson*, 3 Oreg. 115.) The watch in question is not exempt from execution, and not necessary wearing apparel under the laws of this State; in fact, not wearing apparel at all within the meaning of that term. (*Towns v. Pratt*, 33 N. H. 345; *Gooch v. Gooch*, 33 Me. 535; *Freeman Execution*, § 232; *Smith v. Rogers*, 16 Ga. 479; *Frazier v. Barnum*, 19 N. J. Eq. 316; *Smyth Homesteads and Executions*, § 572; *Deposit Nat. Bank v. Wickham*, 44 How. Pr. 421; *Rothchild v. Boelter*, 18 Minn. 361; *Bitting v. Vandenburg*, 17 How Pr. 80; *Leavitt v. Metcalf*, 2 Vt. 342.) The appellant relies mainly on the case *In re Steele*, reported 8 Cent. L. J. 86, and on an article on Common Law Exemptions, 9 Cent. L. J. 262. The case *In re Steele* was an assignment in bankruptcy under the United States Statutes. Revised Statutes, section 5045, provides specially for the exemption of "kitchen furniture, and other articles and necessities," and under that provision a watch was held necessary to a commercial traveler and therefore exempt. If the court should be of the opinion that a watch could or should be included in the term "wearing apparel," then it is a question of fact whether it was necessary, and whether appellant's wearing apparel, including the watch, does not exceed one hundred dollars. (*Willson v. Ellis*, 1 Denio, 462.)

LORD, J.—This is an appeal from an order of the Circuit Court requiring the appellant, an insolvent debtor, to surrender and deliver up to his assignee, for the benefit of his creditors, a

gold watch and chain, valued by his evidence to be worth from fifty to seventy dollars. By his deed of assignment the appellant transferred to his assignee all his property except such as was exempt from execution, but without any specification of such exempt property. The contention of the appellant is, that a watch and chain may be properly considered as an article "of wearing apparel," and as such it is exempt from execution, and protected by his assignment. Our statute provides that the "necessary wearing apparel owned by any person to the value of one hundred dollars" shall be exempt from execution if selected and reserved by the judgment debtor, or his agent, at the time of the levy, or as soon thereafter before the sale thereof as the same shall be known to him, and not otherwise. (Code, § 297, subd. 2.)

The question whether a watch is a necessary article of wearing apparel, and as such, exempt, seems, from the decisions, to depend upon the particular facts, or attendant circumstances of each case, such as the value of the watch, the condition and business of the debtor, etc., and has been differently decided under different circumstances. In *In re Steele*, the meaning of the term "wearing apparel," used in the bankrupt act, was carefully considered by Hammond, J., of the United States District Court for the western district of Tennessee. John Steele had been allowed and claimed no exemption except a watch which was described as "a plain old style single case gold watch, which he had owned for twenty-five years or more, and which would scarcely sell for twenty-five dollars." The question was, whether it could be held by him as exempt under the law exempting "other articles and necessities," and "wearing apparel." The learned judge said: "It would not be doing any great violence to the meaning of the term 'wearing apparel,' as used in the bankrupt act, to include in it a gold watch of moderate value. The definition of the word 'apparel,' as given by lexicographers, is not confined to clothing; the idea of ornamentation seems to be rather a prominent element in the word, and it is not improper to say that a man 'wears' a watch or 'wears' a cane. The exemption law of Arkansas says that 'wearing apparel, except

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watches, shall be exempt." (Ark. Dig. 503; 4 James Bankruptcy, 58; Avery & Hobbs Bankruptcy, 68.) The court allowed John Steele the watch.

In *Rothschild v. Boelter*, 18 Minn. 362, it was held that a silver watch and chain, worth forty or fifty dollars, worn by the debtor, is not exempt under the statute as "wearing apparel of the debtor and his family." The court say: "That an article *may be* worn does not make it wearing apparel within this statute. The words are to be construed in this case according to the common and approved usage of the language, namely, as referring to garments, or clothing generally designed for wear of the debtor and his family." In *Gooch v. Gooch*, 33 Me. 535, it was held that a watch which the testator had been in the habit of carrying with his person does not pass by a bequest of his wearing apparel. Wells, J., says: "The ordinary meaning of wearing apparel is vesture, garments, dress; that which is worn by or appropriated to the person. Ornaments may be so connected and used with the wearing apparel as to belong to it; there are implements, such as pencils and penknives, carried about the person, but not connected with the wearing apparel. These are not to be considered as clothing. To which class does a watch belong? It may not properly be called an implement, for it is used merely to look at; neither is it used as clothing or vesture. In its use it more nearly resembles the pencil or penknife. The court are of the opinion that the watch did not pass under the phrase 'wearing apparel.'" In *Sawyer v. Heirs of Sawyer*, 28 Vt. 251, it was held that a watch was not to be deemed wearing apparel. The court say: "Though a watch may have a further use than mere ornament, yet there is not enough to make it and its incidents wearing apparel." But on this point Redfield, C. J., thought otherwise, saying that "it seems to me that a watch which one wears and the chain and seals are dress and apparel." In *Smith v. Rogers*, 16 Ga. 480, an insolvent moved to exempt from sale a watch that he claimed to be part of his "wearing apparel." His wife had claimed and been allowed a gold watch. The court say: "Various articles of property have from time to time been exempted by the legis-

lature from this liability, but among these articles is not to be found watches, unless they come under the head of 'wearing apparel.' It is doubtful whether they can be made to come under that head; if, however, they can, we think that not more than one can be made to do so." In *Mack v. Parks*, 8 Gray, 520, which was an action of *tort* for taking the plaintiff's watch from his person by force, the court seems to have considered the watch as "part of his dress or apparel." As having some bearing upon this subject, see also *In re Thiell*, 4 Biss. 241; *In re Graham*, 2 Biss. 449; *Bumpus v. Maynard*, 38 Barb. 626; *Herman Ex.* § 99.

The exemption, however, under our statute is limited to the "necessary wearing apparel owned by any person, to the value of one hundred dollars." In construing the word "necessary" in such connection, the courts have been inclined to a liberal rather than a rigid construction. In *Towns v. Pratt*, 33 N. H. 349, under a statute exempting the "wearing apparel necessary for the debtor and his family," the court say: "The word 'necessary,' as here used, is not to be understood in its most rigid sense, implying something indispensable, but as equivalent to convenient and comfortable." (*Peeverly v. Sayles*, 10 N. H. 356.) "It would, therefore, include such articles of dress or clothing as might properly be considered among the necessities in contradistinction to the luxuries of life." (*Davlin v. Stone*, 4 Cush. 359.) If a watch is in no sense "wearing apparel," as some of the authorities indicate, the judicial construction of the word "necessary" is of no importance. On the other hand, it would seem that if a watch worn by a person may be considered as a part of his dress or apparel, the word "necessary," as judicially construed, would not so materially affect the meaning of the phrase "wearing apparel" as to exclude it. It is probably true that a watch is ordinarily worn more for convenience than as a mere luxurious ornament. But to determine whether it is one or the other, necessary or luxurious, as an article of dress or apparel, the value of the watch is allowed to have a controlling influence in determining that result. If the value of the watch be unreasonable, or too much money be invested in it, the law regards it,

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as justice to the creditors would require, rather as a luxury than a necessity. And under our statute this element of value would necessarily become an important factor, as the exemption of "wearing apparel" is limited to one hundred dollars. But, as we have seen, upon the question whether a watch is a necessary article of wearing apparel, the authorities are conflicting. Upon the whole, our own judgment inclines us to the opinion that the phrase "necessary wearing apparel," as used in our statute, may include in it a watch of moderate value without doing violence to its meaning. We are not, therefore, prepared to say that a watch of moderate value is not a necessary article of wearing apparel, and as such exempt, when it is made to appear affirmatively that the watch and other articles of apparel selected or reserved do not exceed the amount limited by the statute.

"*Prima facie*, all the personal property of a judgment debtor is liable to levy and sale upon execution. If he would claim exemption for any of such property, he must bring himself and property within the exception of some statute by proper proof. No property in his possession is exempt *per se*." (*Dains v. Prosser*, 32 Barb. 291.)

It lies with the party claiming property to be exempt to prove the facts affirmatively which go to establish it. Until it is made to appear, at least, what are the articles, and their value, of wearing apparel, selected and reserved by the judgment debtor, the court cannot determine whether the privilege of the exemption laws has been properly exercised or abused to the injury of creditors. There is nothing in the deed of assignment, or in this record, to show what articles of wearing apparel, or the value of the same, which the appellant has reserved, except that he testifies that he has kept as exempt a gold watch and chain worth from fifty to seventy-five dollars. What other wearing apparel, and from the necessity of the case he must have retained some, the quantity and its value, he is silent about. The creditors have a right to know, and the facts lie within his knowledge, and unless he shows affirmatively the facts which sustain his right to the exemption claimed, the court will hardly aid him by pre-

Argument for Appellant.

sumption. This the appellant has not done, and the record before us discloses no error.

The judgment must be affirmed.

[Filed October 29, 1885.]

DUENNA BOON v. H. D. BOON.

DIVORCE—CUSTODY OF MINOR CHILDREN.—A decree of divorce which fails to provide for the care and custody of the minor children of the marriage, if there be such, is defective.

ID.—CRUEL TREATMENT—WHAT NECESSARY TO CONSTITUTE.—The mere fact that a husband has been imprudent and unreasonable, or jealous, does not necessarily constitute a ground for divorce. It must appear that he has evinced a malignant desire to annoy and harass his wife.

ID.—The evidence reviewed, and held not to sustain a charge of cruel and inhuman treatment, rendering life burdensome.

BARION COUNTY. Both parties appeal. Reversed and bill dismissed.

M. F. Bonham, for Duenna Boon.

The insinuations, and virtually direct charges made by the defendant against the plaintiff of unchaste conduct on her part as a wife, persisted in almost continuously for a number of years, are alone sufficient ground for divorce. (*Smith v. Smith*, 8 Oreg. 101; *McMahan v. McMahan*, 9 Oreg. 525.) The court below granted the plaintiff a divorce, but made no decree in reference to the real estate of the defendant. In this the court erred in a matter where it had no discretion to refuse the prayer of plaintiff. (Oreg. Code, p. 210, § 495.) The court below erred in failing to decree to plaintiff the custody of the minor children named in complaint, and a sum or sums of money in gross or installments for the maintenance and education of said children. (Oreg. Code, p. 211, § 497.)

Geo. H. Burnett, and *Mark A. Fullerton*, for H. D. Boon.

The complaint alleges that defendant found fault with plaintiff, and insinuated that she went out into town to meet gentlemen

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for unlawful purposes. The allegation is not sustained by the evidence. The most that is shown is that defendant made inquiries as to his wife's conduct with other gentlemen, and that in every instance they were based either upon facts or on reports to which there was good foundation. An accusation of crime is not cruelty unless it is maliciously made. (*Simons v. Simons*, 13 Tex. 468; *Small v. Small*, 57 Ind. 568.) Divorce is a remedy provided for an innocent party; if what is complained of as cruelty is the result of complainant's own misconduct, it will not furnish ground for the proceeding. (*Knight v. Knight*, 31 Iowa, 451; *Von Glahn v. Von Glahn*, 46 Ill. 134; *Skinner v. Skinner*, 5 Wis. 449; *Richards v. Richards*, 37 Pa. St. 225.) A wife is not entitled to a divorce on the ground of cruel treatment, when such treatment appears to have been of such a character as to furnish her no reasonable grounds to apprehend physical danger by a continuance of the marriage relations. (*Knight v. Knight*, *supra*.) The acts of cruelty, if proved, were condoned by the cohabitation of the parties. (*Phillips v. Phillips*, 27 Wis. 252; *Sullivan v. Sullivan*, 34 Ind. 368.) A divorce should not be granted between husband and wife who continue to cohabit, and separation should be alleged in the complaint and proved on the trial. Cohabitation will be inferred from the living together of husband and wife; and a condonation will be inferred from cohabitation, when the contrary does not appear. (*Burns v. Burns*, 60 Ind. 259.) Had facts tending to show personal indignities been proven, plaintiff's case would fail, because she has not shown that that condition exists which would render her life burdensome. That life has been rendered burdensome is not inferred from facts that go to establish personal indignities. (*Cline v. Cline*, 10 Oreg. 474.)

THAYER, J.—This appeal is from a decree in a suit brought by Duenna Boon against her husband, H. D. Boon, for a divorce. The Circuit Court granted Mrs. Boon the divorce, but did not decree her any portion of her husband's property, nor make any provision for the custody and support of the children of the parties, nor grant alimony to the wife. Both

parties appealed, the plaintiff from a part of the decree, the neglect to grant her the third interest in the defendant's real property, provide for the care and custody of the children, and decree the recovery of an adequate sum of money for their support; the defendant from the whole decree.

Section 495 of the Civil Code provides that "whenever a marriage shall be declared void or dissolved, the party at whose prayer such decree shall be made shall in all cases be entitled to the undivided one third part, in his or her individual right, in fee, of the whole of the real estate owned by the other at the time of such decree, in addition to the further decree for maintenance provided for in section 497; and it shall be the duty of the court, in all such cases, to enter a decree in accordance with this provision." Said section 497 empowers the court to further decree, for the care and custody of the minor children, and for the recovery from the party in fault, such an amount of money in gross or installments as may be just and proper for such party to contribute to the maintenance of the other. This section is only permissive in form, but the former one is imperative. I think, however, that the decree in such a case would be imperfect unless it provided for the care and custody of the minor children, if there were any. The decree therefore should be modified if allowed to stand. The defendant claims that it should not stand, but that it should be reversed upon the grounds that the allegations of the complaint and proofs submitted do not warrant it.

By the laws of this State, a dissolution of the marriage contract may be declared at the suit of the injured party for certain causes, among which is, for cruel and inhuman treatment, or personal indignities rendering life burdensome. The suit in this case was instituted upon that ground, and it is claimed upon the part of the wife that she has been subjected to that character of treatment by her husband.

It appears that the parties married in 1871; that they had five children, the oldest aged twelve years, and the youngest aged three years, at the time that the suit was commenced. The husband has been in business, keeping a book store, and is still

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engaged in that business, and has been successful, financially, having accumulated a reasonable competency; that he has supported his family comfortably, and that the wife and children have a good, comfortable home. The husband has been unfortunately addicted to drinking to excess at long intervals, but it has not incapacitated him from attending to his affairs, or rendered him morose or ugly. The wife says herself, "that he is harmless on such occasions." She, however, claims that for a number of years past he has manifested a jealous disposition towards her when she would speak to other gentlemen, and find fault with her when she would go out in town, for so doing; that upon such occurrences he would taunt her by inquiring whether she had not been to some disreputable place or called on some disreputable person. She says that for some time past she has been in poor health, has been under medical treatment for disease peculiar to females, and that her physician had advised her that unless her husband would, to a great extent, refrain from sexual indulgence she could not be successfully treated, but that against her protest, and the advice of the physician, the husband had persisted in sexual intercourse with her to such an extent, as she was advised by her physician, that it had greatly injured her health and endangered her life.

The proofs in the case were mainly directed to the question of the husband's jealousy, and his conduct connected therewith. A number of charges of misconduct on his part are made in the evidence, but which he has explained away or denied. The charges in the complaint are of such a character that if the proof showed that the husband had been imprudent, unreasonable, and persistent, it would not necessarily establish "cruel and inhuman treatment or personal indignities rendering life burdensome."

Jealousy on the part of a husband may arise from a strong attachment for his wife, from high sense of honor for her reputation, and a desire that she shall be and appear perfect. Again, it may be incited by imprudent conduct upon her part. She may so demean herself as to attract attention and cause comment, and nothing is more calculated to exasperate a sensitive man than that. Whenever, therefore, his conduct has resulted from

the influences referred to, and has not been too unreasonable and violent, it could not be deemed "cruel and inhuman." It is where he evinces a malignant desire to vex, annoy, and harass the wife, that he could be justly chargeable with the character of conduct referred to. The husband who provides a suitable home for his family, and a reasonable and proper maintenance for his wife, is not liable to be actuated by malicious motives in his conduct toward her.

I assume in the outset that the plaintiff has been to the defendant a virtuous wife; but it cannot be claimed, in the light of the evidence, that she has always been prudent in her conduct, and amiable in her temper. Her riding with a certain young man upon two occasions, her visiting his place of business, and her sitting upon the porch with another young man an unseemly length of time, while staying at a certain summer resort, were acts calculated to excite comment, and did occasion remark; and reports were conveyed to her husband regarding her conduct in those particulars. The acts in themselves may have been, and no doubt were, entirely innocent, but were not prudent. These reports, coming to the husband, and several anonymous letters that evidently some vile wretch sent him through the postoffice and otherwise, warning him of her infidelity, seemed to have occasioned all the alleged misconduct on his part complained of. And it is no wonder if he did, under the circumstances, become excited and aggressive. What husband would not, in such a case, demand an explanation from his wife—would not with great solicitude inquire what it meant, and would not enjoin upon her a strict observance of highly proper conduct. The evidence tends to prove that he set a watch upon her movements. She certainly could not complain of that, and, as I remember the evidence, did not. The information he had received was well calculated to excite suspicion, and as long as he continued his investigation in good faith, for the purpose of ascertaining the truth or falsity of the reports, he acted properly. His own honor and the honor of his children was involved in the affair.

The counsel for the plaintiff animadverted with much stress upon the fact that he did not destroy at once the anonymous

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letters he received. It is true that those letters were indecent and unfit to be read, and the first impulse of virtuous indignation would naturally be to destroy them. But their author was guilty of a crime. Whoever he was, he committed an offense when he transmitted obscene matter of that character through the United States mails. Both the plaintiff and defendant manifested a desire to detect the guilty person. Now, without the letters, there would be no evidence of the offense. In view of that it would be necessary to preserve them, and it may be that they were preserved in consequence of that fact.

Said counsel further claims that the defendant "believed the contents of the letters to be true; that he taunted the plaintiff in regard to matters contained in one of them." The matter referred to is the statement in the letter that she was accustomed to meet men at their barn, and she testifies that defendant came home in haste one morning, and said he was a going to have his barn insured. She says that, "at the time he did not say why, but she found out that he had been warned in the letters; that he was afraid they would have a cigar and set the barn on fire." How she found this out does not appear, and I imagine that she only inferred it. The inference may have been correct, or may not. The defendant might not have had that circumstance in view at all when he made the remark, but if he had, it very probably was intended as facetious.

She testified, in answer to this question, "did your husband ever accuse you of unchastity or improper or criminal relations with other men?" that he never did; so that she could not have regarded the remark referred to in any such light. I am unable to discover in the case any sufficient proof of cruel and inhuman treatment as alleged in the complaint, nor does the plaintiff seem to claim it. When Dr. T. L. Golden asked her, after the suit was commenced, what were her grounds for expecting a divorce, her answer was, "that Mr. Boon objected to her going where she pleased, and with whom she pleased, and that she thought a woman had a perfect right to do as she pleased, and go with whom she pleased." It may be inferred from this that she regarded the marriage relation with her husband as too much of

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a restraint upon her free course. The charge that the defendant unreasonably insisted upon having intercourse with her seems to be wholly unsupported by the evidence. It appears, also, from the proofs that the plaintiff is unfortunate in her disposition and temper. This is probably occasioned from her sickness. A witness who had for more than a year lived in the family says: "I have seen her pout; be mad; I hardly ever knew what she was mad at." "I have seen her pout for a week." Besides, she seems to have been very intimate with a neighbor lady, to whom she has been accustomed, I should infer, to communicate her family affairs. These circumstances have very likely served, to a great extent, to create dissension and antagonism between her and her husband. Amity and concord cannot long continue after the family confidence is shared with outside parties.

I have not referred to the conduct of the plaintiff as a justification of the acts of the defendant. He very probably has done wrong in many instances, but I think we have a right to consider all the circumstances surrounding the case. (*Harper v. Harper*, 29 Mo. 301.)

The plaintiff's counsel says that these parties cannot live together as husband and wife should. This, of course, the court has nothing to do with. It can only determine whether the evidence establishes good grounds for a separation, and if it believes that the charges alleged in the complaint have not been sufficiently proved, it can do no less than deny the relief prayed. As I look upon the matter, the court would assume a grave responsibility in the premises if it granted the divorce. The parties to the suit are not the only ones interested in the affair. The welfare of five minor children is to be taken into consideration. What is to be done with them in case of a separation? If the care and custody of them was given to the wife, provision would necessarily have to be made for their support. In that event the accumulation of the parties would have to be divided, the management of a great portion of it confided to the wife, who, in all probability, has had no experience in such matters, and the husband would be left with a remnant, disheartened and discouraged. The inevitable result would be that the property,

Points decided.

now amply sufficient to support the family, and which, if prudently managed, will continue to increase, would be frittered away, and destitution be the consequence. I do not believe it necessary to produce such a state of things in order to remedy evils that, comparatively, are trifling. The parties can live and cohabit happily; they have no occasion to change their home from an eden, as it might be, into a pandemonium, and I have faith to believe that if left to themselves, they will adjust their affairs much better than the court could if it were to undertake it. The effort, in my opinion, would leave them in a much worse condition, and imperil the happiness and welfare of innocent children. Such a course is contrary to my judgment, and, I believe, abhorrent to the feelings of everyone who views the matter impartially. The law does not sanction such interference in any case unless the necessity is absolute. It will dissolve the marriage relation when the conduct of one of the parties towards the other is cruel, and inflicts such a degree of pain of body or mind as to render life burdensome.

After a due consideration of all the facts in this case, I am convinced that the proofs do not establish the charge made by the plaintiff in her complaint, and that it ought, therefore, to be dismissed. Some provision should, however, be made in regard to the costs and expenses of the litigation, which can be considered before entering the decree.

Decree below reversed and bill dismissed.

[Filed November 2, 1885.]

SARAH M. STINSON v. D. P. PORTER, EXECUTOR.

EVIDENCE—VOID JUDICIAL RECORD.—A void judicial proceeding is admissible in evidence as a private writing and part of the *res gestæ*, to show the inducement to a deed made by the parties to cure the defect in such judicial proceedings.

LINN COUNTY. Plaintiff appeals. Affirmed.

The facts are stated in the opinion.

John Kelsay, for Appellant.

L. Flinn, and *C. E. Wolverton*, for Respondent.

LORD, J.—The plaintiff brought this action to recover of the defendant, as executor, a certain sum of money, alleged to be the consideration of a certain deed executed by the plaintiff and her husband to certain parties, which said consideration came into the hands of the defendant's testator and was received by him for the use of the plaintiff.

The defendant, among other things, by way of explanation or inducement, set up in his answer certain proceedings which were had in the Probate Court some years prior, by which it appeared that the guardian of the plaintiff had attempted to convey the identical property which was the subject of the deed aforementioned; and alleging that such proceedings were irregular and defective, and that, by reason thereof, they failed to effect the object contemplated, and that to obviate this defect, or in other words, because these probate proceedings were irregular and defective, the subsequent deed was executed, etc. After issue joined, in the progress of the trial the defendant, in support of his allegations, offered in evidence a certified copy of these proceedings, to which the plaintiff objected as irrelevant, on the ground that the proceedings were void. The objection was overruled by the court, and this constitutes the only assignment of error.

It is clear, from the proceedings, that it was not sought by the defendant to establish any right by virtue of the probate proceedings, for they were alleged to be defective, and the record of them was offered to show that fact, and that the property attempted to be conveyed by the guardian was not conveyed. The purpose of showing these facts was to explain what led to the execution of the deed by the plaintiff subsequently.

It is a mistake to suppose, because a judicial proceeding or decree is void, it is not proper or relevant as evidence for any purpose. In *Willey v. Bonney's Lessee*, 31 Miss. 649, it was held that although a judicial proceeding for the partition of land among coparceners may be void for uncertainty in the designa-

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tion of the parcels allotted to the several parties, yet, if it be referred to in a parol agreement made between them to divide the land, it may be introduced in evidence as a private writing, being a part of the *res gestæ*. The court say: "The report and proceedings of the commissioners were here offered, as connected with the subsequent agreement made between the parties, and their conduct in relation to the land, showing that a parol partition was made between them. The report and plat of the lands, though not valid as a judicial partition, were necessary to explain the acts of the parties with reference to them, and if these proceedings were sanctioned by the parties interested, and they afterwards made them the basis on which they divided the lands among themselves, such ratification would render their proceedings valid as a part of the agreement for partition, and they would be competent evidence, as private writings, forming part of the *res gestæ*." In *Hill v. Parker*, 5 Rich. 96, it was held that while an incomplete proceeding in equity binds nobody as a decree, it may be evidence of its own existence and the consequences therefrom deducible. The court say: "The proceedings there can have no effect against anybody as a judgment, but the papers which contain them may be evidence of their own existence and the consequences which thence result." In *Sebastian v. Ford's Heirs*, 6 Dana, 438, it was held that the record of a void decree may be used to show how the complainant *claimed to hold* the land.

Under some circumstances a judicial proceeding which is void may sometimes be used in evidence as a private writing. As a part, however, of these proceedings, it was not questioned but what the deed was valid, and that parol evidence was admissible to explain the object or purposes for which it was given. Upon this record we must suppose that the evidence was sufficient to satisfy the jury of that object.

The judgment must be affirmed.

Argument for Appellants.

[Filed November 9, 1885.]

J. A. CRAWFORD, L. FLINN, AND B. BRENNER v.
JOHN BEARD AND AMBROSE BEARD.

EVIDENCE—ADMISSION NOT CONNECTED WITH TITLE OR POSSESSION.—In a suit to set aside a deed as in fraud of creditors, evidence of statements and admissions made by the grantor long after the execution of the deed, and unconnected with possession of the property, are immaterial.

JUDGMENT—ENTRY OR, BY CLERK, BY DEFAULT—(WALDO, C. J., dissenting).—The statute authorizing the clerk to enter judgment by default or upon confession is not unconstitutional.

CONSTITUTIONAL LAW.—When a statute has been long recognized as binding, and important affairs of the community have been transacted in accordance with its provisions, it should not be disturbed unless it unequivocally conflicts with the organic law.

FRAUDULENT CONVEYANCE—CREDITORS.—When a person who has contracted for the purchase of machinery conveys away his property before such machinery is delivered, his creditor may show that such conveyance was made with intent to defraud him.

ID.—SUBSEQUENT CREDITORS.—A subsequent creditor cannot attack such a conveyance except by showing that the grantor, at the time he made it, had in view the creation of such debt, and intended to defraud the creditor thereof.

ID.—FRAUDULENT INTENT—PRESUMPTION.—When the necessary result of a debtor's act is to place his property beyond the reach of legal process, it may be presumed that it was done with a fraudulent intent; but when the act is regular and fair upon its face the intent must be gathered from the surroundings.

ID.—VOIDABLE DEED MAY STAND FOR INDEMNITY.—A deed obtained under suspicious or inequitable circumstances, or which is only constructively fraudulent, may be permitted to stand as security for any purpose of reimbursement or indemnity.

LINN COUNTY. Defendants appeal. Decree modified.

The facts are stated in the opinion.

Weatherford & Blackburn, for Appellants.

The legal presumption is that all conveyances are made in good faith and not fraudulently, and the burden of proof rests upon the one who seeks to impeach the same for fraud. (*O'Neal v. Boone*, 82 Ill. 589; *Kruse v. Prindle*, 8 Oreg. 162; *Mehlhop v. Pettibone*, 54 Wis. 656; *Darling v. Hurst*, 39 Mich. 765; Oreg. Code, p. 261, § 766, subd. 19.) Where a conveyance is made upon a valuable consideration, and is alleged to be fraudulent against the grantor's creditors, an actual and express intent to hinder, delay, or defraud is necessary to be proved. (2 Pom.

12	447
15	15
15	20
8*	537
13*	614
13*	646

19	447
28	305
12	447
131	268

12	447
40	196
12	447
147	468
47	590

Argument for Respondents.

Eq. Juris. § 971, n. 2, § 972.) The purchaser may know of the indebtedness of his vendor, but if he do not know of his intention to defraud, the sale will be valid. (*Evans v. Rugee*, 57 Wis. 623.) The plaintiff Flinn has no standing in court, because the indebtedness to him accrued after the sale of the land, and plaintiff Crawford is in the same predicament because a portion of his claim accrued after the sale, and has been merged in a judgment with that which accrued prior thereto. (*Sheppard v. Thomas*, 24 Kan. 780; *Quimby v. Dill*, 40 Me. 528; *Baker v. Gilman*, 52 Barb. 26; *Moritz v. Hoffman*, 35 Ill. 553; *Usher v. Hazeltine*, 5 Greenl. 471; *Kane v. Roberts*, 40 Md. 594; *Lynch v. Raleigh*, 3 Ind. 273; *Watson v. Riskamire*, 45 Iowa, 233; *Stone v. Myers*, 9 Minn. 303; *Gale v. Gould*, 40 Mich. 515.) Leaving out of consideration our statute (Oreg. Code, p. 523, § 55), where there is a valuable consideration for the land conveyed, there must be proof of actual intent to defraud. (*Farlin v. Sook*, 30 Kan. 404.)

L. Flinn, and H. H. Hewitt, for Respondents.

Fraud may be either actual or constructive. Constructive fraud is not a fact, but a conclusion of law from ascertained facts. (*Sayre v. Fredericks*, 16 N. J. Eq. 209; *Barrett v. Barrett*, 5 Oreg. 413; *Page v. Grant*, 9 Oreg. 116; *Elfelt v. Hinch*, 5 Oreg. 255.) Positive and express proof of fraud is not required. It may be deduced from circumstances affording strong presumption. (*Elfelt v. Hinch*, 5 Oreg. 255; 3 Greenl. Ev. § 254; Story Eq. Juris. § 190.) The conveyance of a man's whole estate to a near relative, as in this case, affords a very violent presumption of fraud. (*McDonald v. Farrell*, 60 Iowa, 337; Wait Fraudulent Conveyances, §§ 231, 243; Bump Fraudulent Conveyances, p. 34; *Moore v. Roe*, 35 N. J. Eq. 90.) The statute authorizing judgments by default or upon confession to be entered by the clerk in vacation is not unconstitutional; the clerk in entering judgment acts ministerially and not judicially. (*Willson v. Cleveland*, 30 Cal. 198; *Providence T. Co. v. Prader*, 32 Cal. 636; *Gray v. Palmer*, 28 Cal. 416; *Leese v. Clark*, 28

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Cal. 33; *Harding v. Cowing*, 28 Cal. 212; *Humboldt M. & M. Co. v. Ferry*, 11 Nev. 237; *Durham v. Brown*, 24 Ill. 93; *Lanning v. Carpenter*, 23 Barb. 413; *Hempstead v. Drummond*, 1 Pinn. 534; *Wells v. Morton*, 10 Wis. 468; *Edwards v. Pitzer*, 12 Iowa, 607; *Choat v. Bennett*, 13 Ark. 313.) Courts never declare a statute unconstitutional unless the fact is placed beyond a reasonable doubt. (*Talbot v. Hudson*, 16 Gray, 422; *Ogden v. Saunders*, 12 Wheat. 270; *Crowley v. State*, 11 Oreg. 512; *People v. Supervisors etc.* 17 N. Y. 241.) It is the duty of courts "so to construe every act of the legislature as to make it consistent, if it be possible, with the provisions of the Constitution." (*Dow v. Norris*, 4 N. H. 17; *Clarke v. Rochester*, 24 Barb. 471; *Marshall v. Grimes*, 41 Miss. 27.) When it appears that the intention of the parties to the deed was to put the property beyond the reach of the creditors of John Beard, the transaction was void as to subsequent as well as existing creditors. (*Page v. Grant*, 9 Oreg. 120; Kerr Fraud and Mistake, p. 207; Wait Fraudulent Conveyances, § 100; 1 Story Eq. Juris. §§ 361, 362; *Reade v. Livingston*, 3 Johns. Ch. 499; *Cook v. Johnson*, 1 Beasl. 54.)

THAYER, J.—This is an appeal from a decree rendered by the Circuit Court for the county of Linn, in a suit brought by the said respondents against the said appellants, to subject certain real property to the payment of three several judgments obtained by the said respondents severally against the appellant John Beard, in actions at law in said Circuit Court. Said Crawford's judgment was recovered on the 25th day of September, 1883, for the sum of \$1,291.51 with costs of action; said Brenner's was recovered October 18, 1883, for the sum of \$722.83, with costs of action; and said Flinn's on the same day for the sum of \$321.03, with costs of action. Flinn's judgment was also against one J. J. Beard, who was jointly liable with said John Beard. Executions were duly issued upon each of said judgments, and returned unsatisfied prior to the commencement of the suit.

It appears that Crawford's judgment was upon three promissory notes, one of which bore date in 1875, and is for \$596; the

Arg.

Eq. Juris. § 971, n. 2, the indebtedness of the intention to defraud, 57 Wis. 623.) The because the indebted land, and plaintiff a portion of his merged in a judgment (*Sheppard v. T* 528; *Baker v.* Ill. 553; *Usherts*, 40 Md. *Riskamire*, 4 *Gale v. G* tion our s a valuable be proof Kan. 404.

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ht; nor was the proof that Ambrose Beard was not known have had property at the time he is claimed to have purchased and paid for the land of any consequence. It is not pretended that he paid for it with money and property he then had. He claims, however, that at the age of twenty years his father gave him his time, and that for four years or more prior to the date of the said deed he had occupied the said donation claim, including his mother's portion thereof, as a renter; that he worked it upon shares; that his father had sold his portion of the crop, and that at the time the land was deeded to him his father owed him for a thousand bushels of wheat and about \$300 besides; that there was a mortgage upon the land in suit of \$1,500 principal, and about \$480 accrued interest; that he was to pay for the land by assuming the said mortgage, was to give his father said thousand bushels of wheat, and deliver to him four thousand bushels the following season. With this kind of arrangement it was unimportant whether his neighbors knew whether he had any property or not, or whether he had, prior to 1881, been assessed for taxes upon any property or not. The more important question was, whether his father did owe him a thousand bushels of wheat and \$300 at the time referred to, or any wheat or money; whether he delivered to his father the said four thousand bushels of wheat or any wheat, as he claimed to have done. The proof as to what his neighbors thought about his general financial condition, and that he had not been assessed upon property for the purposes of taxation, or as to how much farmers are accustomed to make off of farms in that vicinity, has no tendency to disprove what Ambrose claimed were the facts of the case. Said proof, in my judgment, was almost or quite valueless.

The respondents' counsel claims that the whole of the debt due to Crawford existed when the deed was executed; and that the notes to Frank Bros. were for farming machinery which John Beard ordered in 1880, but did not receive until 1881, at about the time the said notes were executed, but they admit that none of the debt due to Flinn existed at said time.

The view I am inclined to adopt in adjusting the rights of the

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parties to the controversy, renders it necessary to consider first the question as to the validity of the alleged judgment against John Beard. It is contended upon the part of the appellants that the entry of judgment by default or upon confession, involves the exercise of judicial power, and that, as all judicial power in this State is required to be vested in certain courts, the legislature had no authority to confer any such power upon the clerk. The decisions of other courts under similar provisions of statute or organic restrictions are conflicting. The point of difference between them is a disagreement as to whether such entry is a judicial or ministerial act. If I were required to decide the abstract question I should be very much inclined to hold that the rendition of judgment, in all cases, was a judicial act. The mere entry of judgment, no doubt, is a ministerial duty, but it seems to me that before such entry can be made there must be an adjudication, either that the facts admitted, or the confession and statement in the particular case, entitle the party to a judgment. But our statute upon the subject has been in force for nearly twenty years. It may be said to have been acquiesced in by the bar, and it has tacitly been upheld by the courts. It has become a rule of practice, and if pronounced invalid now would cause disturbance of property rights, and occasion great mischief. When an act of the legislature has been so long recognized as binding, and important affairs of the community affecting individual rights have been transacted in accordance with its provisions, it should not be disturbed unless it plainly and unequivocally conflicts with the organic law. An act which has been sanctioned by the community ought not to be declared unconstitutional by the courts, when the question is in any degree doubtful. Whatever, therefore, my own private notions upon the subject are, so long as I am not positively certain of their correctness, I feel constrained to hold that such judgments are valid.

The appellants' counsel contend that neither the said Crawford nor the said Flinn has any standing to question the *bona fides* of the said deed, as a portion of the claim of the former, they allege, accrued after the execution of the deed, and that

the whole of the latter's accrued after its execution. It is not so evident that any part of Crawford's claim accrued after the deed was made. The notes for the portion alleged to have so accrued were given after said time, but the evidence shows that the order for the machinery was given by John Beard to Frank Bros. in 1880. The debt may not have legally been contracted until the machinery was delivered, but if the sale of the land was *mala fide*, a creditor to whom an order had been given for an article prior to the sale, and out of which the indebtedness arose, had a right to question the transaction, although the article was not delivered until afterwards. The debt was in process of contraction at the time, and I think the creditor could claim, in case the debtor fraudulently sold his property during the interval, that it was done with intent to defraud him. The statute upon the subject is not confined to creditors. It says: "Made with the intent to delay, hinder, or defraud creditors or other persons," etc. (Misc. Laws, § 51, ch. 6.) If said John Beard made said deed to Ambrose Beard to defraud his creditors, it would certainly have included the Frank Bros. claim that was transferred to Crawford.

The Flinn claim stood upon a different basis. That debt was not contracted until long after the deed was executed and upon record. It arose out of the renting of a warehouse let to John and J. J. Beard, and the deed could not be questioned by the holder of that debt, unless it were shown that when the said John Beard executed the deed he had in view the creation of the said debt, and intended to defraud the creditor thereof. In the language of Bump on Fraudulent Conveyances, "the conveyance must be made with an intent to put the property out of the reach of debts, which the grantor at the time of the conveyance intended to contract, and which he does not intend to pay, or has reasonable grounds to believe that he may not be able to pay." The decision in *Page v. Grant*, 9 Oreg. 120, was not intended to establish any different doctrine than this, though the language employed in the opinion is very general. The purpose and intent for which the deed was given must be ascertained by an examination of all the facts and circumstances of

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the case, and if the legitimate inference drawn therefrom is that John Beard intended by the execution of said deed to delay, hinder, or defraud his creditors, and that Ambrose Beard knew when he received it that such was the intent, then it is void as to existing creditors, or subsequent, if the grantor contemplated the contraction of the debts and did not intend to pay them, or had reasonable grounds to believe that he would not be able to pay them.

The respondents' counsel contend that the conveyance from John Beard of the property in question included all his property; that the appellants' account of the affair was vague, uncertain, and contradictory, and that it should be inferred therefrom, in view of the relations of the parties, and the manner in which they had conducted their business before and after the deed was executed, that it was intended to defraud the creditors of said John Beard. Fraud is established in such a case by inference or presumption. It may be inferred or presumed from the nature and character of the transaction itself, or from facts and circumstances connected with it. If the necessary result of the act is to place the debtor's property beyond the reach of legal process, so as to delay creditors, it will be presumed that it was done with a fraudulent intent; but when the act is apparently regular and fair upon its face, the intent must be gathered from the surroundings. In such a case the tests, which reason and experience have shown were indicative of a fraudulent design and purpose, must be resorted to in order to ascertain the probable motive which actuated the parties in the affair. In this case, there is nothing upon the face of the transaction indicating bad faith. John Beard was in debt, it is true, but that did not preclude him from selling his farm. The deed is in the ordinary form. It recites a valuable consideration as having been received, and was placed upon record immediately after its execution. The conveyance was from a father to a son, but the latter was of full age and had an undoubted right to purchase his father's estate. The evidence, therefore, that the sale was made with intent to hinder, delay, or defraud creditors must be sought for outside of the apparent facts in the case. The

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consideration recited in the deed is open to inquiry, and if shown to be only a pretense, the inference would necessarily follow that the transaction was merely colorable. The respondents have attempted to show that there was no consideration in fact for the conveyance, and if they have succeeded in showing that, they have established their cause of suit. That is the vital question in the case.

The testimony tends to show that Ambrose Beard and his father had some negotiation in regard to the sale and purchase of the said land in 1880; that a bond for a deed was drawn up and some notes written out, but the matter was not consummated; that about the time the said deed was executed, they concluded to make a different arrangement, whereby Ambrose was to buy the land, turn in a claim for a thousand bushels of wheat his father owed him, assume the mortgage upon said land that had been executed by John Beard to John Thomas, and the interest accrued thereon, amounting to \$480, and deliver to his father in the following fall four thousand bushels of wheat in full payment of the land. The deed was made and executed and recorded, and I am satisfied from the evidence that said Ambrose delivered to the said John Beard, in pursuance of the bargain, three thousand nine hundred and one bushels and fourteen pounds of wheat.

The testimony of J. J. Beard establishes that fact very fully. He testified that he and John Beard were partners in the warehouse business. Says: "We commenced about August 15th, I won't be positive; some time in the fore part of August, 1881." He was then asked this question: "Will you please turn to the warehouse book for the firm for that year and state how much wheat was left stored there with the firm by Ambrose Beard in the fall of 1881?" Answer. "Three thousand nine hundred and one bushels and fourteen pounds." Question. "State who sold that wheat, when it was sold, and the prices received." A. "The first lot of wheat sold was two hundred and twenty-nine bushels, for seventy-three and one half cents per bushel, September 23d. On September 24th he sold one thousand bushels for seventy-six and one half cents. I haven't got the price of the

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other wheat; December 9th, five hundred bushels; October 26th, seven hundred and sixty-five bushels; December 17th, one thousand four hundred and seven bushels and fourteen pounds; I think it was seventy-nine cents, wouldn't be positive." Q. 12. "To whom was the money paid for the wheat?" A. "To John Beard, I gave him an order on himself for it. He was the treasurer."

These sales, as I compute them, amount to \$3,040.69½, which was the product of the crop of wheat Ambrose Beard raised from the entire farm in the year of 1881. It is claimed by counsel for the respondents that John Beard paid out this money by paying off the interest on the mortgage, the \$480, and the expenses of working the place. I think the evidence shows that John Beard did pay the \$480, though Ambrose claims that he repaid it, or that it was paid out of his money. There is no evidence that John Beard paid any of the expenses of the farm that I have discovered.

It is also claimed by said counsel that Ambrose Beard, after the deed was executed to him, continued to occupy the place as before; that John Beard remained in possession and controlled the management. I do not think the evidence shows that. It is true the parties lived in the same house, but that, with the other buildings upon the claim, and the orchard, were on Mrs. Beard's part. J. J. Beard testifies that Ambrose, after the deed was made, seemed to take the management of affairs; "there was an apparent change in the management and control of the place when the deed was executed."

As I view the matter, there was an intended sale of the property to Ambrose Beard. John Beard had grown old and evidently had not been successful in farming, and some time prior to the summer of 1881 he conceived the idea of going into the warehouse business, and probably thought he would sell to Ambrose and take his pay for the part that would be coming to him in wheat; that he would be in the wheat business and could dispose of the wheat at a better advantage. The dealings between the parties were very loose. It would not seem, by the answer filed in the suit, that they had any definite idea as to

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what their arrangements were. It was understood between them that the old gentlemen owed his son a thousand bushels of wheat, or for that amount of wheat, and some money, but they could neither of them give an intelligent idea about it, yet they made the bargain upon that understanding, and the land was deeded to Ambrose.

That either of the parties actually intended to defraud the creditors of John Beard, I do not think can be maintained from the facts and circumstances of the case. I have no idea that the creditors were considered or thought of. The debts had been standing then a long time, except the portion for the farming machinery which was only in process of creation. No effort seems to have been made upon the part of the creditors, Crawford and Brenner, to collect them. It was not a case where a debtor was being pressed for payment, and was compelled to make a shift. The claims were drawing interest at the rate of one per cent a month, and the holders were no doubt content to let them run. The interest at that rate, kept up for seven or eight years, would produce an amount equal to the principal. Said creditors never manifested sufficient interest in their claims to ascertain before two years and a half that the said deed had been made, although it stood recorded during all that time in the record of deeds in the clerk's office in the town where they lived. They seem to have manifested an entire indifference in regard to the payment of their claims, and they are not entitled to any credit for leniency. The creditor who holds a note against a farmer, that is drawing twelve per cent annual interest, does not confer any benefit on the latter by a forbearance of the debt, as a general thing. It will ordinarily be only a matter of time when the interest eats up the farm.

But while the appellants may not have intended to defraud the creditors of John Beard by the transaction, yet there are suspicious circumstances as to the amount of consideration paid, and of the basis of the transaction. It does not appear sufficiently certain that John Beard owed Ambrose any wheat, or for any wheat, or any money, at the time the deed was executed, nor is it shown satisfactorily that Ambrose furnished the money

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that was paid for interest on the said mortgage to Thomas, the \$480, and the \$300 paid subsequently. It is a well established rule of equity that a deed obtained under suspicious or inequitable circumstances, or which is only constructively fraudulent, may be permitted to stand as security for any purpose of reimbursement or indemnity. (*Boyd v. Dunlap*, 1 Johns. Ch. 478.) I believe this case comes within the principle of that rule. I think that Ambrose Beard should be repaid for the wheat delivered to his father after the deed was executed—the three thousand nine hundred and one bushels and fourteen pounds—after making a reasonable reduction for the use of the premises during the four years he occupied them. According to his own testimony there must have been raised off the premises in question in the year 1881, of the three thousand nine hundred and one bushels and fourteen pounds, about three thousand bushels. Allowing a third of that for the use of the land, it would amount to one thousand bushels, which, at seventy-eight cents a bushel, would be \$780, leaving due to said Ambrose \$2,261.69½. The rent for the other three years subsequent cannot be ascertained with any degree of accuracy. It does not appear what the farm has produced during that time. The product of 1881 is probably no criterion, as the amount of the yield in such cases depends very much on favorable conditions. The \$2,261.69½ should draw interest, which at eight per cent per annum would be about \$181 a year, which for four years would amount to \$724, and added to the principal would make \$2,985.69½. Four hundred dollars a year rent for the three years would be a safe estimate, I think. That would amount to \$1,200, which, taken from the former sum, would leave \$1,785.69½ due the said Ambrose as a charge upon said land.

The decree will therefore be: • *First*, that from the proceeds of the sale of said land, made under the decree of the Circuit Court, the costs and disbursements of said suit and the expenses of making said sale be first paid. *Second*, that the said sum of \$1,785.69½ be next paid therefrom to the said Ambrose Beard. *Third*, that the claim of said Crawford and Brenner be next paid therefrom, if sufficient remains. *Fourth*, that the claim of

Argument for Appellant.

said Flinn be next paid therefrom, if sufficient remains, and the remainder, if there be any, be paid over to the said Ambrose Beard. That neither party recover costs or disbursements upon the appeal.

The chief justice is of the opinion that the statute conferring upon clerks power to enter a judgment in such a case is unconstitutional and void, and that the maxim *communis error facit jus* is inapplicable. (*Pease v. Peck*, 18 How. 597.)

[Filed November 16, 1885.]

BERTHA SAVAGE v. JOHN SAVAGE.

VENDOR AND VENDEE—FIDUCIARY RELATION.—Ordinarily, when there is no fiduciary relation between the parties, and no confidence is reposed by the vendor as to the particular contract, no duty rests on the vendee to disclose facts he may happen to know advantageous to the vendor.

ID.—PRINCIPAL AND AGENT.—B. S., living in Missouri, appointed J. S., a relative residing in this State, her attorney in fact, to lease lands belonging to her in this State and collect the rents arising therefrom, and relied on him for information as to the condition and value of said lands. Subsequently, B. S. wrote J. S. desiring to sell her said lands, and asking him to make an offer for the land in controversy, and in reply he offered her \$6,000 therefor. Prior to the acceptance of such offer, a third person offered J. S. the same sum for a part only of said premises, the latter promising to transmit such offer to the owner, but failing to do so. In a suit to set aside the deed from B. S. to J. S. made upon the acceptance of the latter's proposition, *held*, that there was such a relation of trust and confidence between the vendor and vendee as required the latter to transmit such offer to the former before purchasing himself, and that failing to do so the deed to him should be set aside on repayment of the purchase money.

MARION COUNTY. Plaintiff appeals. Reversed.

N. B. Knight, for Appellant.

It is an inflexible rule of law that an agent employed or authorized to sell cannot make himself a purchaser. If he does, the sale is voidable at the option of the principal. It makes no difference how fair the transaction may have been, or in what perfect good faith the agent may have acted, a court of equity will set it aside at the suit of the principal. (*Porter v. Woodruff*, 36 N. J. Eq. 179, 180; *Conkey v. Bond*, 34 Barb. 276; *Staats v. Bergen*, 17 N. J. Eq. 558.) When the fiduciary relation

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of principal and agent exists, without any express or special authority in the agent to sell the property of his principal, and the agent purchase it directly from his principal, courts of equity will uphold such a contract only when it affirmatively appears that the agent acted in the utmost good faith; that he concealed or suppressed no fact within his knowledge which might have influenced the judgment of his principal as to the price or value of the property. (1 Story Eq. § 316 *a.*; *Porter v. Woodruff*, *supra*; *Rubidoez v. Parks*, 48 Cal. 215.) The mere fact that a reasonable consideration was paid is not of itself sufficient. Any lack of perfect good faith renders the transaction voidable. (2 Pomeroy Eq. Juris. § 959.)

Til. Ford, for Respondent.

Everything so far as the defendant was concerned in the purchase was fair and regular in all respects, and the plaintiff and defendant dealt together as principals and not as principal and agent. Even if the court should find the parties were principal and agent in the transaction, in the absence of fraud the sale would be good. (*Fisher's Appeal*, 34 Pa. St. 29, 31.) The court says: "It never has been supposed that the principal might not sell to his agent, or the client to his attorney, and that their titles thus acquired would not be good in the absence of fraud on their part." (1 Parson Contracts, p. 76.)

THAYER, J. — This appeal is from the Circuit Court for the county of Marion. The appellant commenced a suit in that court against the respondent to have a certain deed executed by the former to the latter, on the 3d day of October, 1882, to certain lands in said county, canceled, and said lands reconveyed to her. She alleged in her complaint that on and prior to the 3d day of October, 1882, she owned said lands in fee; that in April, 1882, she executed to the respondent a power of attorney appointing him her attorney in fact, to take possession and have charge of said lands, to sell the same, execute deeds to purchasers, and do all acts necessary to carry out said power; that after executing said power of attorney, she left the State and

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went to Kansas City, Mo., where she remained until April, 1884; that on or about the 1st of October, 1882, she received through the mails an offer from the respondent of \$6,000 for the whole of said lands, and desiring to sell the same, and not knowing at the time that any greater sum of money could be obtained therefor, and relying upon the respondent's honesty and good faith, she accepted the said offer, and made him the deed; that the respondent knew that as appellant's agent he had been offered before, and was offered at the said time, and could have sold one of the parcels of the lands, a certain one hundred and twenty-four acre tract, for the sum of \$6,000 cash, and could have sold the whole of said lands for \$8,000 cash; that they were reasonably worth that sum, and that he fraudulently concealed from the appellant said facts, and by reason of such suppression obtained from her the said deed; that she had after learning of the fraud offered to return him his money and had demanded a reconveyance.

The respondent denied the allegations of the complaint as to his attorneyship, the offer, value of the land, and fraud, and alleged affirmatively that since he purchased the land he had paid out for taxes the sum of \$115.

Depositions and proofs having been taken, the case was heard by said Circuit Court and the complaint dismissed, from which decision the appeal was taken to this court. It appears from the testimony and proofs that the appellant was born and raised upon the lands in question; that about 1875 she married and went East with her husband; that her husband having obtained a divorce from her in 1881, she returned and lived with her uncle, John Savage, Jr., on the lands until April 5, 1882, when she went back to Kansas City, Mo., where she resided, as alleged in the complaint; that she and the respondent are second cousins; that she was the owner of the lands; that about the 16th day of September, 1880, she executed to the respondent the following power of attorney:—

“Know all men by these presents that I, Bertha E. Savage, of Junction City, Kansas, have made, constituted, and appointed, and by these presents do make, constitute, and appoint, John

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Savage, Sr., of Salem, Marion County, Oregon, my true and lawful attorney in fact for me and in my name, place, and stead, and for my use, to ask, demand, sue for, collect, and receive and receipt for all such sums of money which now or shall be or hereafter are owing or belong to me in the State of Oregon by any person or persons whatsoever; and I hereby further authorize and empower my said attorney in fact to lease or rent any and all lands now owned by me, or which I may have any interest in, in the said State of Oregon, and to collect the rents therefor, and to do everything in and about the premises as fully to all intents and purposes as I could or would do if personally present (with full power of substitution or revocation), hereby ratifying, confirming, and holding valid all that my said attorney shall lawfully do or cause to be done by virtue of these presents. In witness whereof, I have hereunto set my hand and seal this — day of —, A. D. 1880.

[SEAL.]

"BERTHA E. SAVAGE.

"Done in presence of ARTHUR P. DAVIS."

That the respondent accepted the trust and acted under said power of attorney until the execution of the deed sought to be canceled. It is claimed by the appellant that there was a subsequent power of attorney executed by her to the respondent in April, 1872, empowering him to sell and convey the property as alleged in the complaint, but that is stoutly denied by the latter, and, in the opinion of all the members of the court is not sustained by the evidence.

It further appears from the proofs that the following correspondence, at the respective times therein mentioned, took place between the appellant and the respondent in reference to the sale and purchase of said lands. —

"KANSAS CITY, Aug. 31, 1882.

"*Dear Cousin John:* — In a letter received from Aunt Hattie a short time ago she said you were going to write and advise my selling my property there. At the time I received her letter I thought I would NEVER, NEVER sell, but have changed my mind. There are splendid chances here every day to invest in city residence property which would bring me each year as much as I

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get off from the farm in two. And more than this, property is advancing at least ten per cent each year, and in some localities fifty. I shall always hope to *sometime* get the little farm back again. Please give your earliest attention—write me what you will give me for it in cash, and to facilitate matters I will answer your letter by telegram if I accept your proposition; and any way that you can hurry the matter along do so.

“Hope this will find you all well and in the midst of a bountiful harvest with favorable weather to assist in securing it.

“If I thought ma could pay me cash for the place, and as much as anyone else would be willing to pay for it, she would be the one I would write to of my desire to sell; for I remember she once said if I sold she would like to buy it from me; and it is only natural that she should want it. Let me hear from you as soon as possible. I am real well and enjoy myself sometimes. Have been at work this summer you know. When you write, address me at Kansas City, Missouri, as I get my letters at the postoffice. With kind regards, I am

“Yours, etc.,

BERTHA SAVAGE.”

The following is the respondent's answer to the above:—

“SALEM, Sept. 11, 1882.

“*Dear Cousin:*—I received yours of the 31st yesterday, and was glad to hear you was well. I did not tell Hattie I was going to advise you to sell; I told her if I could not make the land fetch in more profit, you had better sell it. I only got three hundred and sixty bushels of oats and sold them for thirty-seven and one half cents per bushels and one hundred and thirty bushels of wheat. I shall sell it as soon as hauled, then I will pay Ford and Stratton and will send you what is left. I had not thought of buying your land. I was going next week to Walla Walla with my money, for I can't let it out here any more only in small dribbs. So if you conclude to take me up at my offer I won't go; I will give you six thousand dollars for your whole interest here; at that it will be a good while before I could get my money back. If you conclude to take me up at my offer, telegraph immediately. John is talking of buying the two other heirs out on the Miller

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place—the two hundred and fifteen acres—for three thousand six hundred dollars. If he had not of bought the one, I would of bought it, for it is cheaper than yourn, bein' more land and laying together. We are all well and hope you the same. John had more wild oats than anything else and if it ain't summer fallowed, it won't pay taxes and keep fences up. If you take me up, I will send you a check on any bank you say. I would of written before but I wanted to see how much grain you would have.

“From your friend. Write often. Yours etc.

“JOHN SAVAGE.”

On the same day the letter was mailed, the respondent notified the appellant of it by telegraph as follows:—

“SALEM, OREGON, Sept. 11, 1882.

“*Bertha E. Savage*:—I have written you an offer of six thousand dollars for your full interest here. If you accept, telegraph immediately.

JOHN SAVAGE.”

On September 18, 1882, the appellant telegraphed her acceptance of the offer as follows:—

“KANSAS CITY, MO., 18th Sept., 1882.

“*John Savage*, P. O. 330, Salem:—I accept your offer; hurry papers along as soon as possible.

BERTHA SAVAGE.”

On September 22, 1883, the appellant also wrote the respondent, in which she gave directions about sending the money, and in which she requested that he would send her \$500, without waiting for the deeds to be sent there, signed, and returned again. She also suggested that it would probably have been better if she had sent him a quit-claim deed—that it would have expedited the affair. The respondent upon receipt of the appellant's telegram accepting his offer had Judge J. J. Shaw, of Salem, prepare a deed and forward it to the appellant at Kansas City, for execution, which she did at the time before mentioned, October 3, 1882, and sent it to the respondent by mail.

The appellant's counsel contends that at some period between the time the respondent received the appellant's letter of August 31, 1882, and the date of his reply thereto, September 11, 1882, a gentleman by the name of Durbin, who owns land adjoining

the said one hundred and twenty-four acre tract, applied to the respondent to purchase said tract, and thereupon offered to pay therefor the same amount, \$6,000, that the respondent paid for all of appellant's lands, including said tract; that instead of informing the appellant that Mr. Durbin would pay said sum for said tract, the respondent took advantage of the circumstances and made said purchase, and thereby obtained the other lands, a reversionary seventh interest in a tract of three hundred and fourteen and forty-six one-hundredths acres, subject to the dower right of Mrs. M. J. Savage, a widow lady, and seventy-eight and eighty-one one-hundredths acres of timber land, alleged to be worth \$2,000, for nothing.

There is some contradiction as to the time when Mr. Durbin made said offer, and as to the quantity of land that was included in it. He was examined as a witness in the case, and testified to the following, viz. :—

“Age, fifty-four years; occupation, stock-raiser; residence, Wasco County, Oregon.” In answer to question three he says: “I know the tract of one hundred and twenty-four acres, and know about where the timber land is, and the dower property. They are situated on Salem Prairie, that is, the dowry and the one hundred and twenty-four acres; the other is back in the timber, east of the other property.”

“Question. 4—You may state if you ever had any conversation with the defendant about the purchase of either of those tracts of land.

“Answer—I had a conversation with Mr. Savage, I think sometime along about the 1st of September, 1882, about the tract of land—one hundred and twenty-four acres. I came to town and heard Mr. Savage wanted to see me. I inquired and looked for Mr. Savage, and found him on Commercial Street. I says, Mr. Savage, I understand you want to see me. He says yes, I wanted to know if you want to buy this piece of land or place of Bertha Savage. I says, I don't know whether I do or not; it is owing to what she asks for it. Well, he says, what will you give for it? I asked him how much there was

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of it. He says there is one hundred and twenty-five acres of it. I studied a bit and says, I will give you \$5,500 for it, and he says I don't think she will take that for it. We talked and had some conversation about that and other matters, and I finally told him that I would give \$6,000 for it if he would telegraph and get me an answer in a short time. He said he thought she would take that for it; and agreed to telegraph to her. I saw him a day or two after that, and I asked him if he had telegraphed to her, he said that he hadn't; that he had written to her; that he couldn't explain things to her as he would like to in regard to the fencing and condition the place was in, but he said I need not be uneasy, that I would get the place; that is, that she would accept my offer. I then, sometime after that, asked Mr. Savage if he had heard from Bertha, and he told me that he hadn't. One day I happened to step into the bank; Mr. Savage was in there doing some business with Mr. Albert. I stood there till they got through their business. From the conversation they were having, I suspicioned that all wasn't right, and asked John Savage if he had heard from Bertha. He said he had, and was just sending her the money for the land. I says to him I don't want you to send any money for me, as I have the money to pay for it myself, and he says I may let you have it yet, and I asked him if he didn't calculate to let me have the land—got into quite a little jower over it. During this time I had heard that she had eighty-seven acres out in the timber, and a dower of forty acres in Mrs. Lute Savage's place. I says Mr. Savage, I am a little ahead there. Mr. Savage says to me, I have done so much for Bertha, and I told him that I would give him \$250 for his trouble and expense, besides the \$6,000. All the answer that Mr. Savage would make me was that I may let you have it yet. I then told him that he was getting this seventy-eight acres out there in the timber and the dower for what I had offered for the one hundred and twenty-five acres, and he says, I know my own business; I may let you have it yet. I says to him, I will give \$8,000 for the whole of it, and I will give you two or three days—I don't recollect just how long—to let me

know whether you will let me have the one hundred and twenty-five acres or not. If you don't I will telegraph to Bertha to not accept your checks; that I will give \$8,000 for it. At the length of time that I had given him for an answer he came out to my place, two and one half miles east of Salem—it was after dark when he came there—and I asked him if he had been to supper, we had just got through, and he said he hadn't, and they fixed him a bite of supper, and after that we sit and talked for about an hour over matters and things. Mr. Savage spoke about going home; I says you had better stay all night; he says no, but Sol., I would like to see you a bit. We got our hats and went out to the gate between the house and the road, and Mr. Savage says, I will let you have that place—that piece of land, and make you a deed to it as soon as my wife comes home. She was in the East I believe. Well, I says, that is all right, John; but he says there isn't quite so much of it as I thought there was, only one hundred and twenty-four acres. I says that don't make any difference—one acre don't make any difference. I says here is twenty dollars, you take that John; he says there is no use of that, I give you my word you shall have it; I said your word has always been good to me, but we have had a little dispute about this. He says, it will be all right, and I will make you a deed when my wife comes home. Mr. Savage went home, I suppose. There was nothing more said. I heard that Mrs. Savage was home. I went down there to Mr. Savage's, Mr. Savage wasn't at home; I left word that I would like to see him—would like to have him come up. Mr. Savage didn't come and I left word a second time. Mr. Savage came up and said if I would come into town on such a day he would make out the deed. I went in on the day that was appointed, met Mr. Savage—nothing said—we passed one another; it ran along until it was getting along in the afternoon; I looked around and found Mr. Savage, and told him he had better make out that deed and fix up our business. He then told me that his wife would not sign the deed unless he would give her \$1,000. We had a few words and that ended our business.

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"Q. 5.—You may state whether, at the time you met the defendant in the bank here, when he was preparing to send the money to the plaintiff for her lands, you offered and would have paid to him in cash \$8,000 for the three several tracts of land described in the complaint, and which you have mentioned?

"A.—I would have given \$8,000 for it; I believe I offered Mr. Savage that, less the \$250 that I had offered him as bonus on the \$6,000.

"Q. 6—You had offered the defendant, then, \$6,000 for the one hundred and twenty-four acre tract, and \$250 besides, to pay him for his trouble and expense that he has been to; is that the fact or not?

"A.—Yes, that's the fact.

"Q. 7—During any of the time that you were negotiating with the defendant for the purchase of the one hundred and twenty-four acre tract, did he state to you whether he had the power from the plaintiff to sell the same?

"A.—He did; he said at the time we first talked of the trade he could make me a deed himself, but he would prefer that she would do it. The conversation I had with Mr. Savage in the bank here was in Bush's Bank, Mr. Albert was behind the counter, and I forget who the other man was."

"Cross-examination. Q. 9—State, Mr. Durbin, just what passed between you and Mr. Savage in Mr. Bush's bank in Mr. Albert's presence at the time you have referred to.

"A.—Well, I asked Mr. Savage if he had heard from Bertha; he said that he had, that he was just sending her the money for the land; I says, Mr. Savage, I don't want you to send any money for me, I have got the money myself; he says, well, I may let you have it yet; and the conversation went on; I don't recollect what all was said, but I told him that if he didn't give me an answer in two or three days that I would telegraph to Bertha not to accept his money for the land, that I would give \$8,000 for it, and that I would give him two or three days, I think, to give me an answer.

"Q. 12—Did you not go to John Savage, Jr., a short time after you found you couldn't get the land and try to get him to

go in with you and help bust up the plaintiff's deed to the defendant for the land in dispute?

"A. — I did not; but I went to John Savage, Jr., and told him what I had offered Mr. John Savage here, the defendant, and what I understood he was getting for what I had offered for the one hundred and twenty-four acres, and as it was a brother's child, that I thought it was his duty to look into it, and told him that anything I could assist him in I would do so, as I always thought a great deal of her father Lute. Mr. Savage says to me, John Savage has a mortgage on my farm of \$2,000 and I am afraid to have anything to do with it. I told him other men had money as well as John Savage."

The respondent was examined as a witness, and testified that the first conversation between him and Mr. Durbin in regard to the sale of the land took place on the 17th or 18th day of September, 1882, the day before appellant accepted his offer, and that Mr. Durbin's proposition was to purchase all of appellant's lands; that it included the three parcels referred to, the same land respondent purchased from appellant. The court has considered this question of fact fully, and concluded that the weight of the testimony upon the question is in favor of the appellant. Mr. Durbin's testimony seems to be corroborated by the circumstances, and also by the testimony of other witnesses, and while it may not be accurate in all its particulars, or invulnerable to criticism, still I think he made the offer to buy the one hundred and twenty-four acre tract of land, and to pay the \$6,000 therefor, and that the offer was made before there was any acceptance of respondent's offer made to appellant, by the letter of September 11, 1882, and most probably before that offer was forwarded to her.

If this be the correct view of the facts, it becomes important to inquire whether the respondent was under any legal obligation to inform the appellant of Durbin's offer for the said parcel of land before purchasing it himself in the manner he purchased it. Ordinarily, where there is no fiduciary relation between the parties, and no confidence is reposed by the vendor as to the particular contract, no duty rests upon the vendee to disclose facts

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he may happen to know advantageous to the vendor. It is said in 2 Sugden on Vendors, 406, that "it may be laid down as a general proposition, that trustees who accepted the trusts, unless they are nominally such, as trustees to preserve contingent remainders, agents, commissioners of bankruptcy, assignees of bankrupts or of insolvents, whilst the distinction remained, or their partners in business, solicitors to the commission, auctioneers, creditors who have been consulted as to the mode of sale, counsel, or any person, who, by being employed or concerned in the affairs of another, have acquired a knowledge of the property, are incapable of purchasing such property themselves, except under certain restrictions." The agency of the respondent only empowered him, first, to collect any and all money due the appellant in the State of Oregon; and second, to lease or rent any and all lands then owned by her, or in which she had any interest, in said State, collect the rents therefor, and do everything in and about the premises as fully, to all intents and purposes, as she could or would do if personally present; and the question arises whether he, by virtue of such relation, was under any obligation to disclose the fact of said Durbin's offer, when the appellant proposed to him to become a purchaser of the property.

Mr. Pomeroy, in his work upon Equity Jurisprudence, section 902, says that "all the instances in which the duty exists, and in which concealment is, therefore, fraudulent, may be reduced to three distinct classes. The first class includes all those instances in which, wholly independent of the form, nature, or object of the contract or other transaction, there is a previously existing definite fiduciary relation between the parties; so that the obligation of perfect good faith and of complete disclosure always arises from the existing relations of trust and confidence, and is necessarily impressed upon any transaction which takes place between such persons." And he gives as examples, contracts and other transactions between a principal and agent, a client and attorney, a beneficiary and trustee, a ward and guardian, and the like. "The second class embraces those instances in which there is no existing special fiduciary relation

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between the parties, and the transaction is not in its essential nature fiduciary, but it appears that either one or each of the parties in entering into the contract, or other transactions, expressly reposed a trust and confidence in the other, or else from the circumstances of the case, the nature of their dealings or their position towards each other, such a trust and confidence in the particular case is necessarily implied. The nature of the transaction is not the test in this class." "The third class includes cases where the contract or other transaction itself, in its essential nature, is intrinsically fiduciary, and necessarily calls for perfect good faith and full disclosure, without regard to any particular intention of the parties." And he gives the contract of insurance as an example falling within that class.

The respondent was the agent of the appellant for a certain purpose, but it is doubted whether it was such an agency as is contemplated in the proposition laid down in *Sugden*, or as comes within the first class of cases mentioned by Prof. Pomeroy. That depends upon what the reason or foundation of the rule is, which incapacitates or restricts the right of the party to purchase the property in such cases. If it is solely because the agent is under an existing contract with the principal to aid and assist him to the best of his ability in the disposal of the property, then I would suppose that a mere agency to rent property and collect and pay over the proceeds would not preclude the agent from purchasing it as freely as a stranger might do. The agent, in such a case, does not contract to discharge a duty connected at all with the sale of property. But if the obligation arises out of the trust and confidence which the relation shows was reposed in the purchaser by the vendor, then it is immaterial whether the authority empowered the purchaser to sell or rent the property. The relation proves a trust and confidence in either case. In the case of attorney and client, I apprehend that it would make no difference, if the former purchased property of the latter, whether he was employed in a matter concerning the property, or concerning some other affair of the client; that he would be as much obligated in the one case as the other to disclose every fact that would tend to enhance its value, and that

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the reason therefor would be the trust and confidence arising from the relations of the parties. That is certainly the reason why a guardian cannot purchase property from his ward. But whether the relation between the appellant and respondent was of such a character or not, their position towards each other was such that a trust and confidence in the particular case is implied.

The parties are relatives; the appellant was living out of the State; she had made the respondent her agent, as before mentioned, and he was acting in that capacity when the offer of Durbin was made for the property. And I think, under these circumstances, it was his duty to have informed the appellant of the offer. It is true she wrote him to make her an offer, but it is evident, from the tenor of her letter, that she expected to get as much from him as anyone else would give. She says in her letter of August 31, 1882: "If she thought ma could pay her cash for the place, and as much as anyone else would be willing to pay for it, she would sell it to her." She did not intend to let it go to anyone for less than it would bring, and if the respondent had communicated to her the offer Durbin had made, she certainly would not have accepted the respondent's offer. The tenor of the respondent's letter was calculated to induce her to accept his offer. It contained a statement of the yield of the land that season, and the account was far from encouraging; besides, it conveyed the idea that if he made the purchase it would be a very slow investment, says, "I will give you \$6,000 for your whole interest here; at that, it would be a good while before I could get my money back." Now, if Durbin had already made him an offer of the same amount of money for the one hundred and twenty-four acre tract alone, as I am inclined to believe, from the testimony, he had, the statement was not candid. He should, in any event, have communicated to the appellant the fact of Durbin's offer, though made after he transmitted his proposition to purchase. He acquired the knowledge of the fact from his connection with her affairs, and honesty and fair dealing, under the circumstances of the case, required him to give the information. The parties were not dealing "at

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arms length," nor upon an equality of footing. The respondent was upon the ground, and had the management and control of the premises, and the appellant, as between her and the respondent, was entitled to receive therefor all that any person would pay, and no doubt believed, when she accepted the offer and executed the deed, that she was obtaining as high a price for her lands as anyone else would be willing to give.

I think the said deed should be canceled upon the appellant's doing equity. She must, of course, first restore to the respondent what he has paid her, the \$6,000. Her attorney made some kind of written offer before the suit was commenced to pay him back the money, less \$1,200, the rental value of the premises, but I do not think the offer was sufficient. She had had the use of the money, and that in my opinion was worth as much or more than the use of the lands; consequently she should not be allowed costs. The respondent claims to have paid taxes upon the property, but the taxes upon the money which she was liable to pay, and probably did pay, is a fair stand-off. The respondent should have interest upon the \$6,000, at the rate of eight per cent per annum, and be charged with the rents and profits.

The decree should be that upon the appellant's paying to the respondent the sum of \$6,000, and interest at the rate aforesaid, less rents and profits, within ninety days from the date of the entry of the decree in this court, with interest thereon at the rate of eight per cent per annum from the date of such entry, the respondent reconvey to her the entire lands conveyed to him by the said deed. That the deed of reconveyance contain a covenant against any acts of the respondent, done or suffered, except the non-payment of taxes levied during the year 1885, and that the original deed from the appellant to the respondent be thereupon set aside and canceled. The respondent could, after the suit was begun, have made an offer under section 511 of the Civil Code, to allow a decree to be given against him for the relief granted herein, and have recovered costs from the time of the service of the offer, but not having availed himself of the benefit of that provision, he should not be entitled to recover costs.

Argument for Appellant.

Neither party, therefore, will be allowed costs or disbursements in either court, but each shall pay one half of the disbursements incurred herein.

[NOTE.—On a petition for a rehearing on the question of costs the appellant was allowed her disbursements in this court and the Circuit Court.—RER.]

[Filed November 16, 1885.]

VIRGINIA WATSON v. DUNDEE MORTGAGE AND TRUST INVESTMENT COMPANY.

MORTGAGE—REGISTRATION OF.—In this State a mortgage is only a security for a debt or the performance of the acts therein mentioned. But in form it is a conveyance, and as such within the intent of the registry act.

ASSIGNMENT OF MORTGAGE—RECORDING OF, UNNECESSARY.—(THAYER, J., dissenting).—A mortgage may be assigned without a formal conveyance. Such an assignment is not within the meaning of the registry act, and does not need to be recorded to protect the assignee against subsequent purchasers or encumbrancers.

FORECLOSURE—INTEREST ACQUIRED BY PURCHASER.—The purchaser at a foreclosure sale acquires the right of the mortgagee so far as he has any claim or interest in the premises for the security of his debt, and also so much of the equity of redemption as is not bound by the lien of a junior encumbrancer.

MERGER IN EQUITY.—Where the owner in whom different estates have united has an interest in keeping them distinct, the intent to keep the estates separate will be implied or presumed, and there will be no merger.

ID.—INTERVENING ESTATE.—When an outstanding estate intervenes between the several interests uniting in the same person there cannot be a merger.

EQUITY—FORECLOSURE—DEFAULT—ASSIGNEE, WHEN BOUND BY—AGENT—TRUSTEE.—R., the duly authorized agent of a foreign corporation, took a mortgage in his own name as "manager," and in fact as trustee for such company. In February, 1881, a prior mortgage on the same premises was foreclosed, R. being made a party and making default. In September, 1881, R., being still the agent of the corporation, brought suit in his own name as "manager" to foreclose the first-named mortgage so far as it affected other lands, recognizing in his bill the fact and the validity of the previous foreclosure. *Held*, that the corporation was bound by R.'s default in the first foreclosure suit, notwithstanding he had prior thereto formally assigned his said mortgage to said company.

MARION COUNTY. Defendant appeals. Affirmed.

The facts are stated in the opinion.

Ellis G. Hughes, for Appellant.

It is a general and well-settled rule that in order to render a valid judgment or decree against a party, the court must have jurisdiction by and under service of process on him in the suit.

12	474
24	212
8*	548
33*	612
12	474
28	370
12	474
135	73
12	474
38	360
12	474
46	591
12	474
48	357
148	358

Argument for Appellant.

(*Case v. Humphrey*, 6 Conn. 139; *Starr v. Scott*, 8 Conn. 483, 484; *Jones v. Kenny*, Hardin, 96; *Ex parte Davis*, 41 Me. 59.) And this rule is applied to foreclosure suits to the extent of a holding therein that subsequent lien holders are not cut out or affected by suits to foreclose prior liens, to which they are not parties or in which they are not served. (*McCall v. Yard*, 9 N. J. Eq. 359; *Brainard v. Cooper*, 10 N. Y. 357, 358, 359; *Goodenow v. Ewer*, 16 Cal. 466-468; *Sellwood v. Gray*, 11 Oreg. 535.) It is not necessary to record an assignment to protect the rights of an assignee. (*James v. Morey*, 2 Cowen, 246; S. C. 14 Am. Dec. 475, 481, 488, 509, 510; *Oreg. & W. Trust Ins. Co. v. Shaw*, 5 Sawy. 342.) No purchaser under the Dickson foreclosure could claim to stand in a better position than a subsequent assignee from Reid would have done. They acted on the chance that he was the proper party to the foreclosure suit. The proper parties to a foreclosure suit must be made defendant at the peril of plaintiff and purchasers. (*Swift v. Edson*, 5 Conn. 535, 536.) When Hughes purchased at the foreclosure sale under the Dickson mortgage, he acquired, *first*, the legal estate formerly owned by McCallister, subject to the lien of the mortgage to defendant; *second*, a claim on the property prior to the lien of this defendant, as for the amount actually due on the Dickson mortgages, without the costs of the foreclosure sale. (*Sellwood v. Gray*, 11 Oreg. 535; *Gage v. Brewster*, 31 N. Y. 218; *Vroom v. Ditmas*, 4 Paige, 531; *Benedict v. Gilman*, 4 Paige, 51; *Vanderkemp v. Skelton*, 11 Paige, 28.) Hughes sometime after his purchase conveyed the land which he had purchased at the Dickson foreclosure to Swegle. Nothing was said about a conveyance of a separate lien and legal estate. Hughes conveyed as the absolute owner of the land. This either left the title to the lien in Hughes or it worked a merger. In fact, it worked a merger. The rule is that a conveyance in fee by the party holding both a mortgage lien and the fee, without mention of the lien, works a merger. (1 Jones Mortgages, § 867.) The plaintiff is a simple lien holder, having taken a lien on the land under a mistake as to the condition of the title, and the existence of defendant's lien. As between her and the

Argument for Respondent.

defendant, the defendant has the superior equity, but even if the equities were equal, the defendant being prior in point of time must prevail. Nor have the proceedings in the United States court any bearing. The mortgage remains a lien, and may be enforced notwithstanding a judgment for a whole or a part of the mortgage debt, or a decree of foreclosure. (2 Jones Mortgages, § 936, p. 41.) The allegations in the bill do not bind the plaintiff in the suit, in any event when not sworn to. (2 Greenl. Ev. 594, § 561, n. 1.)

E. B. Watson, for Respondent Virginia Watson.

A mortgage is a conveyance of an "estate or interest" in lands, else there is no provision for recording it, as it is not specially named in the statute. (Misc. Laws, ch. 6, pp. 514, *et seq.*) And if a mortgage is such a conveyance, an assignment of a mortgage must also be, for it passes the estate of the mortgagee to the assignee. (*Decker v. Boice*, 83 N. Y. 220.) Our registry act dates back to 1854, and is, we believe, older than the Revised Statutes of New York, whose language is construed in this decision. And there is stronger ground for holding in the present case than in that, that the interest of a mortgagee was regarded by the legislature as an "estate or interest" in lands at the time our act was passed. The exception in section 29 of the same chapter sustains, rather than opposes, this construction. (1 Jones Mortgages, § 472; *Belden v. Meeker*, 47 N. Y. 307.) Taking all the provisions of our registry act together, as well as those referring to the foreclosure of liens, and the inference is, we think, very strong that every change in interest in real property should appear of record. (Civ. Code, § 411; *Decker v. Boice*, 83 N. Y. 220; *Bacon v. Van Schoonhoven*, 87 N. Y. 446.) But if an assignment of a mortgage is not within the recording act of this State, still the Dundee Company should be held as estopped from setting it up in this suit. (*Henderson v. Pilgrim*, 22 Tex. 464; *McCa e v. Farnsworth*, 27 Mich. 52; *White v. Bartlett*, 14 Neb. 320; *Bowling v. Cook*, 39 Iowa, 200; *Moore v. Metrop. Bank*, 55 N. Y. 41; *Davis v. Bechstein*, 69 N. Y. 440.) The Dundee Co. has split its

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demand, and is trying to foreclose its mortgage piecemeal in different courts. This cannot be allowed. (*Miller v. Covert*, 1 Wend. 487; *Mascarel v. Raffour*, 51 Cal. 242; *Herriter v. Porter*, 23 Cal. 385; 2 Jones Mortgages, § 1463.) And in equity the plaintiff's claim for purchase money loaned to Eugene McCallister, is equally as much entitled to protection as Eugene McCallister's claim for the same money would have been had he furnished it himself. She has the same equities he would have had, if he had advanced the purchase money. (*Person v. Merrick*, 5 Wis. 231; *Benedict v. Gilman*, 4 Paige, 58; *Goodman v. White*, 26 Conn. 317; *Brainerd v. Cooper*, 10 N. Y. 356; *Vanderkemp v. Skelton*, 11 Paige, 28; *Knowles v. Rablin*, 20 Iowa, 101; *Thompson v. Chancellor*, 7 Greenl. 377.)

Wm. M. Ramsey, for himself and for Respondents Bonham and Piper.

W. M. Holmes, for Respondent Levy.

LORD, J.—This is a suit in equity to foreclose a mortgage executed by Eugene McCallister to the plaintiff, upon a certain tract of 220 acres of land in Marion County. The question to be decided involves the priority of liens, first, as between the appellant and the plaintiff; and second, as between the appellant and his co-defendants.

A summary of the facts out of which the controversy arises is, that the two first mortgages on this land were given by H. McCallister and wife to Eliza Dickson, one in October, 1874, and the other in November, 1878, to secure two certain promissory notes, and that subsequently the same were assigned to James Dickson. After this, and in September, 1879, the next mortgage was given by the said H. McCallister and wife to "Wm. Reid, Manager," upon the same land, and other lands of the mortgagors, to secure notes of that date; and this is the mortgage through which the appellant, the Dundee Mortgage and Trust Investment Company, make their claim in this suit. At the time this mortgage was executed, and until September, in 1882, Wm. Reid was the general agent of the Dundee Com-

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pany, and manager of its affairs in this State. In January, 1880, William Reid, Manager, assigned the said mortgage by an instrument in writing, duly acknowledged but not recorded, to the Dundee Company.

In December, 1880, James Dickson brought a suit to foreclose the two mortgages assigned to him by Eliza Dickson, in the Circuit Court for Marion County, against H. McCallister and wife, and made Wm. Reid a party, as the holder of a subsequent lien. Service of the summons was duly made on Reid personally. In February, 1881, a decree was rendered in favor of Dickson for \$6,282.28, and \$338 costs and disbursements, as the first lien. Execution was issued and the premises were sold in April, 1881, to John Hughes, for \$6,794.19, being but one dollar in excess of such decree, interest, costs, and disbursements, and accruing expenses. This sale was confirmed and a sheriff's deed executed to Hughes.

On September 21, 1881, Wm. Reid, Manager, filed his petition to foreclose the mortgage so given to him in the United States Circuit Court, and in that petition Reid, as plaintiff, alleges that the two mortgages given to Eliza Dickson on the 220 acre tract were prior liens, and had been foreclosed in a suit to which he was made a party in the Circuit Court for Marion County, and the said tract was duly sold under the decree therein, and the lien of his mortgage thereby cut off and extinguished as to such tract; and that he then had no lien thereon and was not entitled to any decree for the sale of the same. John Hughes, who then held the legal title to said tract of land under the sheriff's deed, was made a party defendant to such suit. A decree of foreclosure was rendered in May, 1882, for the amount due on the mortgage, and for the sale of all the land included therein, except this 220 acres, and the same was duly sold under such decree in October, 1884. On the 3d day of October, 1881, Hughes and wife conveyed the 220 acre tract to Geo. W. Swegle for the stated consideration of \$7,500, and on July 20, 1882, Swegle and wife conveyed the same property to Eugene McCallister for the stated consideration of \$5,000. On that day the plaintiff loaned Eugene McCallister \$5,000, and took the note and

mortgage which forms the basis of this suit. In July, 1883, Eugene McCallister brought an action in ejectment against H. McCallister and wife to obtain possession of the mortgaged land. The defendants filed a cross-bill in equity that the plaintiff Eugene McCallister hold in trust for them, and in January, 1884, a decree was made to that effect. On the 29th day of January, 1884, but after the decree in the Supreme Court, H. McCallister and wife executed a note and mortgage upon this tract of land to the defendants Bonham, Ramsey, Piper, and Chadwick. The defendant Levy is a judgment creditor. The decree for the balance in favor of the appellant in the United States court was not docketed until subsequently to all these liens. The court below rendered a decree declaring that the lien of the plaintiff and the lien of the co-defendants of the appellant were prior to its lien.

Upon the facts, as stated, the appellant admits that the plaintiff made her loan and took the security in good faith and without any notice of the trust as between Eugene McCallister and H. McCallister and wife, and upon the representations of the latter to the plaintiff at the time, that their son Eugene was about to make the purchase on his own account and needed the money to pay the purchase price, and that the amount claimed by the plaintiff is due; admits that the plaintiff had no notice of the assignment by Reid to the appellant, nor had Dickson any actual notice of the same, and that Reid was manager for the defendant, and had notice of the facts as to Dickson's foreclosure, and that the 220 acre tract is not of sufficient value to pay the plaintiff anything, if appellant has a first lien; admits that the 220 acre tract was excepted out of the foreclosure proceedings in the United States court, but the plaintiff was no party to that suit.

The first question presented for our consideration upon this record is, whether the assignment of a mortgage is such a conveyance as is manifestly within the intent of our registry act. If it is such a conveyance, the counsel for the appellant admits the failure to record the assignment of the mortgage in this suit is fatal to this case. Upon this point, the contention of the

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plaintiff is, that a mortgage is a conveyance of an "estate or interest" in lands; otherwise there is no provision under the registry act for recording it, as it is not specially named in the statute (Misc. Laws, ch. 6, pp. 514, *et seq.*); and his conclusion is, that if a mortgage is such a conveyance, an assignment of a mortgage must be also, for it passes the estate or interest of the mortgagee to the assignee. And this conclusion, the counsel for the plaintiff insists, is further strengthened by a fair construction of all the provisions of our registry law, taken in connection with the provisions of section 411 of the Civil Code for the foreclosure of liens.

In this State a mortgage is literally a security for a debt or the performance of the acts therein mentioned (*Sellwood v. Gray*, 11 Oreg. 535); but in form it is a conveyance, and as such within the intent of the registry act, which requires it to be recorded to affect with notice subsequent encumbrancers and purchasers. And the assignment of a mortgage may be in the form of a conveyance, and when thus executed and acknowledged it may be admitted to record. But we all know that the assignment of a mortgage may be effected without any such formal conveyance. It may be assigned by a mere writing of the assignor declaring that he thereby assigns the mortgage to the person named in such writing, or it may be assigned by a simple indorsement or delivery of the note for which the mortgage is a security. It is a familiar principle that in the case of a debt secured by mortgage, the debt is the principal and the mortgage an incident, and that an assignment of the debt is an assignment of the mortgage. This principle is too well understood, and the authorities in support of it are too numerous to require citation.

And in cases of this character which are not in the form of a conveyance, there is no assignment to record or which would be entitled to record. Nor do we understand, when the assignment of the mortgage is made in the form of a conveyance, there is any obligation imposed by the statute which requires the assignee to have it recorded to protect himself against subsequent encumbrancers and purchasers; only, when executed in such form, it may be admitted to record, and when recorded a certified copy

of it may, perhaps, be used as evidence. Such would seem to be the effect and extent of the implication arising out of sections 22 and 34 of the chapter of Miscellaneous Laws referred to, *supra*.

But however this may be, there is nothing in these sections or the statute, expressly or otherwise, requiring such an assignment to be recorded by the assignee to protect himself against subsequent purchasers and mortgagees. The most that can be said is, that when the instrument of assignment is in the form of a conveyance it may be admitted to record, but the statute imposes no obligation upon the assignee to record it. Whether he shall record it or not, when in such form, would seem to be wholly discretionary. The fact that the mortgage may be assigned by other modes not in the form of a conveyance, effectual to transfer the lien, which would not be entitled to record, without prejudice to the rights of the assignee as against subsequent purchasers or encumbrancers, would seem to make this all the more apparent. The reason which brings the mortgage within the intent of the recording act, without specially naming it, and requires it to be recorded to give constructive notice, is that it must necessarily be in the form of a conveyance. There is no other mode of executing it. The necessity of the case brings it within the meaning of the registry act for the recording of conveyances.

It is needless to say that an assignment of a mortgage does not come within this principle. The general rule is that unless the recording of the assignment is required by law, the recording of it is of no effect. (Pomeroy Eq. Juris. § 651, n.) The truth is, the construction of our recording act in respect to the particular matter under consideration has received a very careful consideration by Mr. Justice Deady in *Oregon Trust Co. v. Shaw*, 5 Sawy. 342, 343; and the result he reached was in conformity with the view here expressed. While it is true his construction of our statute is not absolutely binding upon us, yet his acknowledged familiarity with our statutes, rendered perhaps more especially so by his repeated and eminent services in their codification, and his deservedly high reputation as a jurist and

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thinker, entitles his judicial opinions at all times to high consideration, and in the particular case to more than ordinary weight. He said: "In the absence, then, of any legislative direction to that effect, there does not seem to be any obligation resting upon an assignee to record his assignment to protect himself against any subsequent purchaser or mortgagee." And in this view we record our concurrence as the result of our investigation.

It is next claimed by the appellant that when Hughes purchased at the foreclosure sale of the Dickson mortgages, by such sale he acquired the legal title formerly owned by H. McCallister and wife, subject to the lien of the mortgage to the appellant, and a claim on the property prior to the lien of the appellant as for the amount due on the Dickson mortgages. In *Sellwood v. Gray*, 11 Oreg. 535, S. C. 5 Pacif. Rep. 196, it was held that the effect of a foreclosure is to transfer to the purchaser the rights of the mortgagee so far as he has any claim or interest in the mortgaged premises for the security of his debt, and also to transfer to him so much of the equity of redemption as was not bound by the lien of a junior mortgage.

The title, then, which Hughes acquired under the sale to him was precisely the same as if he had taken an assignment of the Dickson mortgages, and the deed of Hardin McCallister and wife of all their interests in the premises, subject to the right of the appellant to redeem the premises by the payment of the amount due on the Dickson mortgages. He had all the estate of the mortgagors and mortgagee, subject only to the lien of the appellant's mortgage. And as to the Dickson mortgages, with which we are more particularly concerned, he acquired the right to them in the same manner and to the same extent as though the mortgages had been assigned to him without foreclosure. (*Vanderkemp v. Skelton*, 11 Paige, 33; *Vroom v. Ditmas*, 4 Paige, 531.) Of course, we are proceeding upon the hypothesis, as contended for by counsel for appellant, that the appellant, the Dundee Co., was not made a party to the foreclosure under the Dickson mortgages, and that as to the proceedings were a nullity.

But to return. As a result of this, it is admitted that when Hughes bought at the foreclosure sale, he acquired, as separate and distinct interests in him, the prior lien of the Dickson mortgages, and the legal title, subject to the lien of the appellant's mortgage. Now the counsel for the appellant contends that if these interests were in fact existing in him as separate and distinct interests, then, under the rules of merger, he had the power to merge one in the other, and once merged, they never could be separated; or that he had the power to keep them separate, and convey one as separate from the other; but that when he conveyed by deed to Swegle, and Swegle to Eugene McCallister, the effect was to work a merger of the lien and fee; and as a consequence, when the plaintiff loaned the money to Eugene McCallister for the purchase of the property, the Dickson mortgages and the fee being merged, she did not succeed to the equitable interest of the Dickson mortgages as a purchaser under the decree of foreclosure.

It is difficult to understand, upon the facts disclosed by this record, how the foundation for a merger could exist while the outstanding encumbrance of the appellant was a subsisting lien upon the land. Some brief notice of what constitutes merger, and how it is regarded in equity, will assist in the disposal of the question under consideration. A merger is defined to be "where a greater and lesser estate coincide and meet in one and the same person, in one and the same right, without any intermediate estate," then at once the lesser estate is absorbed by the greater, or, in legal parlance, merged. In equity, mergers are considered odious, and are much less favored than at law, and are made to depend upon the intention and interest of the party. It is only in those cases where it is perfectly indifferent to the party in whom the interests had united whether the charge or term should or should not subsist, that in equity the term is merged. (*Forbes v. Moffatt*, 18 Ves. Jr. 394.) But if the owner has an interest in keeping them distinct, or there is an intervening right, there will be no merger. "The doctrine of merger," said Bellows, C. J., "springs from the fact that when the entire equitable and legal estates are united in the same

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person, there can be no occasion to keep them distinct, for ordinarily it could be of no use to the owner to keep up a charge upon an estate of which he was seized in fee-simple; but if there is any outstanding, intervening title, the foundation of the merger does not exist, and as a matter of law, it is so declared." (*Stantons v. Thompson*, 49 N. H. 272.) "But if the owner of the legal and equitable title has an interest in keeping these titles distinct, he has a right so to keep them, and the mortgage will not be extinguished." (Wilde, J., in *Loud v. Lane*, 8 Met. 518.)

The intent to preserve the interests or rights distinct may be express or implied. And Lord Thurlow said: "Whenever it is more beneficial for the person entitled to the charge to let the estate stand with the encumbrance upon it than to take it discharged of the encumbrance, that circumstance will have a controlling influence in deciding upon the implied intent." (*Compton v. Oxenden*, 2 Ves. Jr. 264.) In the absence then of an express intention to the contrary, the intention to keep the two estates separate will be implied or presumed, when it is for the interest of the party that they should be kept separate. It will not do, then, as was said by Elliot, J., to assume, as a matter of course, that there was a merger, for there are many cases in which, in order to prevent injustice, courts will not allow merger to take place, although all the essential elements of a technical merger combine in the particular case. (*Evansville Gas Light Co. v. State*, 73 Ind. 222.)

Now, the Dickson mortgages being prior liens to that of the appellant, who was not made a party to the foreclosure proceedings under them, Hughes, by his purchase at such foreclosure sale, acquired, not only the equity of redemption, subject to the mortgage of the appellant, but the right to the Dickson mortgages in the same manner and to the same extent as though they had been assigned to him without foreclosure. And it was manifestly for the interest of Hughes that these mortgages should not be extinguished or merged in the legal title, as the mortgage of the appellant was a subsisting lien upon the property, and he would have been obliged to satisfy it before the property would

be free from encumbrance; or in other words, he would lose the benefit of the Dickson mortgages to which he had been subrogated by said foreclosure sale. To place Hughes, or those who succeeded to his place or rights, in this position, upon the ground of a technical merger, would work a flagrant injustice, while by keeping these interests separate and distinct, the rights of priority are preserved and maintained in the order in which the several transactions occurred and were recorded, and injustice prevented. Surely, if it be true, as counsel contended, that these mortgages have not been foreclosed as to the appellant, because it was not made a party to the foreclosure proceedings under them, then they are still in existence, not merged, but subsisting liens; and being prior liens to that of the appellant, the only way for the appellant to get rid of them is to redeem.

Nor is it perceived why the same equitable principle is not alike applicable to the other purchasers, Swegle and Eugene McCallister. If Hughes, as purchaser at the sheriff's sale under the decree of foreclosure, succeeded to all Dickson's rights and priorities under these mortgages, so did Swegle, as purchaser from Hughes, and Eugene McCallister, as purchaser from Swegle, become invested with the same rights and priorities. It would be as manifestly unjust to allow a technical merger against them as Hughes, and the interest of each successive party to the transaction is such in keeping the estates or interests separate that equity will presume such was the intention.

The facts show a case where it is not perfectly indifferent to the parties in whom the interests had united that they should or should not be merged, but their interests require that they should be kept separate to protect from injustice and to conserve equity and good conscience. And in equity the plaintiff is a purchaser, and her claim for the purchase money loaned to Eugene McCallister is equally as much entitled to protection, and her interests as much opposed to a merger, as Eugene McCallister's claim for the same money would have been had he furnished it himself. She had the same equities he would have had if he had advanced the purchase money. This invests her with the same rights and priorities, and entitles her to be

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paid before the appellant. Nor does it work any injustice to the appellant, for it only preserves that order of priority which existed when its mortgage was executed and of which it had full notice.

Thus far we have conceded the assumption of counsel for the appellant that the service upon Reid in the Dickson foreclosure was not service upon the appellant, and that as to it the proceeding was a nullity, for the purpose of showing that there is no equitable principle which can be applied to push this junior encumbrance in front of the prior lien, or supersede the equitable rights arising under it. The fact is, the contention of counsel necessarily assumes the existence of an outstanding, intervening interest or lien which is opposed to the foundation of merger. We must now examine the rights of the appellant with respect to its co-defendant.

The facts show, as is alleged in the answer of the Dundee Co., appellant, that this mortgage was made to Wm. Reid, Manager, but it was, in fact, for the Dundee Co., and that Reid assigned it to the company January 20, 1880, but that the assignment was not recorded. Subsequently, in February, 1881, the Dickson mortgages were foreclosed, and Reid being the ostensible owner of record was made a party and made default. Yet, after this assignment and these foreclosure proceedings had taken place, and while Reid was still the agent or trustee of the company, in September, 1881, he brought suit in the United States court, in his own name, as manager, to foreclose this same mortgage. In that suit the regularity of the proceedings and the service upon Reid in the Dickson foreclosure is alleged, and the recitals of the record expressly declare that the rights of the Dundee Co. were foreclosed and barred so far as the 220 acres are concerned, and a decree is entered in conformity therewith. The company thus sues in the name of Reid after the assignment, and by virtue of his relation to act for them. As disclosed by this record, there can be no doubt that Reid had control of the business of the company in Oregon, and the possession of the property, with authority to transact such business and to hold the legal title to such property in his own name, and

in all respects to deal with it as his own, so far as third persons or parties are concerned. This is not the case of an assignment to a stranger, and then afterwards the assignor being impleaded as a junior encumbrancer by a prior mortgagee, and subsequently bringing suit in his own name on the mortgage which he had previously assigned; but that of the agent or trustee of the party, made such ostensible owner of record by such party, and with authority by virtue of his relation to act in the premises.

The difference is manifest. The act of Reid was the act of the principal or bound the principal. If he was endued with capacity to sue as the owner, as he did, his act was the act of the principal, and made him a proper party to the prior proceedings in the foreclosure. The transaction seems to be susceptible of no other construction, and to hold otherwise would work a manifest injustice, if not a fraud. It certainly ought not to be allowed to take advantage of its own act, and claim that it had no notice of the Dickson suit, when the party to the record, and the same party it had placed upon the record as owner of this mortgage, was impleaded in the suit and made default. There was in fact but one interest, and that Reid was made to represent. Mr. Jones says: "It has been held in some cases, however, that as trustee and *cestui que trust* represent but one interest, he alone should be made a party to the suit, as he would be the party entitled to redeem."

The facts of this case are such that we think it would be inequitable to allow the appellant to take this advantage, and until better advised, the decree must stand.

THAYER, J., concurs in the result, but dissents from the conclusion that the recording acts of this State do not extend to assignments of a mortgage.

WALDO, C. J., absent.

Opinion of the Court—Waldo, C. J.

[Filed November 16, 1885.]

W. S. POWELL v. DAYTON, SHERIDAN & GRANDE
RONDE R. R. CO.

VENDOR AND VENDEE—CONTRACT OF SALE—DESTRUCTION OF PROPERTY.—In every contract for the conveyance of property there is an implied condition that the subject-matter of the contract shall be in existence when the time for performance arrives. If it has then ceased to exist, each party is discharged from the contract.

COVENANTS—BREACH OF—PERFORMANCE.—Covenants are dependent and concurrent when the act of each party is to be done at the same time. In such case the party alleging a breach must aver a tender of performance on his part at the stipulated time.

YAMHILL COUNTY. Defendant appeals. Reversed.

The facts are stated in the opinion.

E. C. Bronaugh, for Appellant.

James K. Kelly, for Respondent.

WALDO, C. J.—This is an action brought by the vendor of real estate against the vendee for breach of a written contract to purchase the estate.

1, On the 1st day of July, 1878, the plaintiff leased the premises to the defendant for the term of five years, at the monthly rental of fifty-five dollars, and the lease contained the further provision, and the defendant agreed "to purchase of said Powell, and pay the said Powell, on or before the expiration of the said term of five years, the sum of \$5,500 in United States gold coin, for all the said warehouse property," etc. The plaintiff alleges that he made out and tendered a deed to the defendant on the 10th day of November, 1883, and assuming thereby to have performed all conditions precedent on his part, claimed the entire purchase price. There is good authority for the position that in an action at law the vendor of real estate may recover the contract price if he shall make out and tender a deed at the proper time, and, it should seem, keep the tender good by bringing the deed into court. (1 Sedgw. Dam. 386, *et seq.*; *Curran v. Rogers*, 35 Mich. 221.)

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Counsel for plaintiff did not urge the point, however, at the trial, and made no objection to the direction of the court to the jury, to the effect that the loss of the bargain was the measure of damages. The court also directed the jury that the washing away of the warehouse before the time for the performance of the contract had arrived did not affect the plaintiff's right to recover, unless the loss happened through the plaintiff's negligence. These instructions are alleged as error. The defendant's counsel do not seem to have taken the position in the court below, that the destruction of the warehouse determined the contract. That, however, is the position here, and must be considered.

In every contract for the conveyance of property, there is an implied condition that the subject-matter of the contract shall be in existence when the time for the performance of the contract arrives. That is the contract, the understanding of the parties. If it has ceased to exist when that time arrives, each party is discharged from his contract, the vendor from his contract to convey, the vendee from paying the purchase price. Hence the rule: "When property, real or personal, is destroyed by fire, the loss falls on the person who is the owner at the time; and if the owner of the house and land agrees to sell and convey it upon the payment of a certain price, which the purchaser agrees to pay, and before full payment the house is destroyed by accidental fire, so that the vendor cannot perform the agreement on his part, he cannot recover or retain any part of the purchase money." (*Wells v. Calnan*, 107 Mass. 514; *Gould v. Murch*, 70 Me. 288; *Thompson v. Gould*, 20 Pick. 134; *Taylor v. Caldwell*, 3 Best & Smith, 826; *Appleby v. Myers*, Law R. 2 Com. P. 651; *Dexter v. Norton*, 47 N. Y. 62; *Brunby & Smith*, 3 Ala. 123, cited by counsel in *Appleby v. Myers*, *supra*.)

Several cases in equity were cited by the plaintiff's counsel to show that the defendants were the equitable owners at the time of the loss. Under the terms of the contract this is very doubtful; but if it were true, it would make no difference here, unless such an estate were recognized at law, which it is not.

2. The covenants in an agreement are dependent and concurrent where the act of each party is to be done at the same

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time. A mere readiness to perform at such time is not sufficient, but the plaintiff must aver a tender of performance on his part. (*Williams v. Healey*, 3 Denio, 367; *Johnson v. Wygant*, 11 Wend. 49; *Green v. Reynolds*, 2 Johns. 207; *Adams v. Williams*, 2 Watts & S. 228.) The plaintiff has, indeed, made a tender of a deed, but not until long after the time fixed by the parties for the performance of the contract. The breach on the part of the defendant, if any, should have occurred at that time. The plaintiff has not the power to keep the contract open, and to tender a deed months after the 1st day of July, 1883, and then allege a breach as arising at the time of the tender. This would be to alter the terms of the contract. (*Thompson, J., Bank of Columbia v. Hagner*, 1 Peters, 465.)

This point was made on the part of the defendant at the argument, though it seems to have been overlooked at the trial. As it must be fatal if the case comes again before the Circuit Court, it will be useless to direct a new trial.

Judgment reversed.

THAYER, J.—I concur in the opinion delivered in this case, that the respondent cannot recover unless the destruction of the warehouse was occasioned by the act or neglect of the appellant. I believe that it is supported by reason and authority, although I was slow in arriving at that conclusion.

As to the question of construction of the contract of May 24, 1878, I am unable to concur in the view the majority of the court have expressed. When the case was argued, I was inclined to the opinion that the payment of the purchase price for the premises and the execution of the deed were intended to be concurrent acts, but upon more mature reflection, I have concluded that the appellant was obligated to pay the purchase money absolutely, at all events, unless the respondent by some act on his part prevented it. I am satisfied that the latter is not required to execute the deed until the appellant pays the money. By the terms of the contract, the respondent agreed to lease to the appellant the premises for five years, commencing on the 1st day of July, 1878, in consideration of which the appellant

agreed to pay the respondent for the rent and use thereof the sum of fifty-five dollars per month; and further agreed to purchase them of the respondent, and to pay him therefor on or before the expiration of said term the sum of \$5,500. The respondent agreed that upon such payment being made, he would make and deliver to the appellant a good and sufficient deed to the premises in fee-simple. In pursuance of that contract the appellant entered upon and enjoyed the use and occupation of the premises during the term of said lease and agreement.

It is conceded by the authorities that covenants are to be construed to be either dependent or independent, according to the intention and meaning of the parties and the good sense of the case, and that technical words should give way to such intention. In the note to the somewhat ancient case of *Pordage v. Cole*, 1 Saund. 320, certain rules are laid down by which such intention may be ascertained and discovered; and they have been so often recognized and approved by the courts that they have become maxims in the law. Among said rules is the following: "3. Where a covenant goes only to a part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant without averring performance in the declaration."

The contract between the parties in this case included the leasing as well as the purchase of the premises. The leasing for a term of five years constituted a material part of the consideration. The agreement to purchase was evidently the inducement to lease. The appellant says, by the contract, in effect, that if the respondent will lease the premises to the appellant for the term of five years, at the monthly rent of fifty-five dollars, the appellant will, on or before the expiration of that time, pay to the respondent \$5,500 therefor. The former, after enjoying that privilege, had no alternative but to pay the purchase price and look to the latter for the deed. The appellant had the right to pay the purchase money at any time extending through a period of five years, and it would be absurd to require the respondent to have had a deed prepared ready to deliver

Points decided.

during all that time. It may be claimed that the rent was an equivalent for the use of the premises; but I do not know that. If the stipulation in the contract to purchase the premises had not been included in it, the respondent might not have been willing to rent for fifty-five dollars a month, or at all.

I understand the meaning of the rule I have recited to be, that where a contract embraces two subjects, and it has been performed as to one of them, and the party has a remedy for the breach of the performance of the other, the covenants as to that are not dependent unless made so by express words or necessary implication. The payment of the money for the premises would naturally precede the execution of the deed, and after the appellant had enjoyed the benefit of a part of the contract, its obligation to perform the other part became absolute.

I am of the opinion that this case comes within the reason of said rule. I think it would be unjust to allow said appellant to enjoy the part of the contract, and not pay the purchase price of the premises as it stipulated to do, because the respondent did not come forward in advance of such payment and tender a deed. Under the circumstances of the case, I do not believe that the respondent's obligation to tender a deed would arise until after payment of the money.

[Filed November 17, 1885.]

CARTER, RICE & CO. v. M. KOSHLAND, GARNISHEE.

GARNISHEE — PROCESS — SERVICE — VOLUNTARY APPEARANCE. — In garnishment proceedings the order provided for in sections 150 and 160 of the Code of Civil Procedure is process, and must be served on the garnishee personally. Service upon his attorney is insufficient. But when it appears that such garnishee voluntarily appeared in person and by attorney at the hearing upon such order, such appearance is equivalent to personal service.

APPEARANCE — NOTICE OF. — The formal notice of appearance in a judicial proceeding prescribed in section 520 is unnecessary, unless the right of the attorney to appear is challenged by the adverse party.

NUNC PRO TUNC ORDER. — *Semble*, that at any time when the rights of third parties have not intervened, a court may so amend its records as to make them conform to the truth.

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Argument for Respondents.

GARNISHMENT—NOTICE OF.—The delivery to a garnishee of a copy of the writ of attachment, together with a notice to the effect that the officer thereby “attached all debts, property, money, rights, dues, and credits of every nature in his hands or under his control,” is a valid garnishment, and sufficiently specifies the property attached.

ID.—JUDGMENT AGAINST—ORDER OF SALE OF ATTACHED PROPERTY.—The Act of October 25, 1878, authorizing an order of sale of property attached supersedes the previous provisions authorizing the entry of judgment against a garnishee, and is a complete substitute therefor.

MULTNOMAH COUNTY. Koshland, garnishee, appeals. Reversed.

The opinion states the facts.

Alfred F. Sears, Jr., and Raleigh Stott, for Appellant.

The question is, whether service of process, to bring a party before the court, is valid, when made upon an attorney. It may be affirmed that the order of a court citing the appearance of the garnishee was the process; and the statute is decisive. (Laws 1876, pp. 9, 38; Code, § 522; *Tebo v. Baker*, 77 N. Y. 33; *Loop v. Gould*, 17 Hun, 585; *Riddle v. Oram*, 3 Abb. N. Cas. 117.) The Circuit Court had no authority to make the *nunc pro tunc* order purporting to show a voluntary appearance of the garnishee. Such an order may be made during the term at which the judgment was rendered, while the facts are fresh in the memory of the judge, but after the term has passed the record cannot be amended, unless there is something in the record to amend by. (*Blackamore's Case*, 8 Coke R. 156; *Tidd's Prac.* 4th Am. ed. 713.) This rule has been adopted in California. (*Branger v. Chevalier*, 9 Cal. 172; *De Castro v. Richardson*, 25 Cal. 49; *Hegeler v. Henckell*, 27 Cal. 492.)

M. G. Munley, and E. B. Watson, for Respondents.

It may be that a general retainer, merely, will not empower an attorney to accept service of process. But if especially authorized his acceptance will be valid. And under the circumstances of this case such special authority will be presumed,

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on appeal as well as on collateral attack. (Weeks Attys. §§ 199, 218; *Dobbins v. Dupree*, 39 Ga. 394; *Conrey v. Brenham*, 1 La. An. 397; *Denton v. Noyes*, 6 Johns. 295; *Gallard v. Smart*, 6 Cowen, 385; *McCreery v. Everding*, 44 Cal. 284; *Ornn v. Nat. Bank*, 16 Kan. 341; *Gilchrist v. Cannon*, 1 Cold. 581; *Chester v. Walters*, 30 Tex. 53; *Cantuline v. State*, 33 Ala. 439; *Stevens v. Helm*, 15 Ind. 183; *Muscantine Turn Verein v. Frink*, 18 Iowa, 469; *Finch v. Lambert*, 62 Pa. St. 370; *Galpin v. Page*, 18 Wall. 350.) The original judgment entry recites the presence of the garnishee's attorney. Such a recital is a sufficient record of the appearance of the garnishee, and is equivalent to proof of service upon him. (Oreg. Code, § 61; *Rogue River Mining Co. v. Walker*, 1 Oreg. 341; *White v. N. W. Stage Co.* 5 Oreg. 99.) The section construed in this decision is identical with said section 61 (Stats. 1854, § 36, p. 88, *Christal v. Kelly*, 88 N. Y. 285), and raises a conclusive presumption on appeal that such appearance was authorized. (*McCreery v. Everding*, 44 Cal. 284.) The Circuit Court had the power to amend its record after the term, so as to show the appearance of the garnishee. (Freeman Judgments, §§ 63, 71, 72; *Road Co. v. Douglas Co.* 5 Oreg. 406; *Strong v. Barnhart*, 6 Oreg. 93; *Harvey's Heirs v. Wait*, 10 Oreg. 117; *Durning v. Burkhardt*, 34 Wis. 588; *Balch v. Gray*, 7 Cush. 282; *State v. Williams*, 28 La. An. 310; *May v. People*, 92 Ill. 343; *Priest v. McMaster*, 52 Mo. 60; *Foster v. Woodfin*, 65 N. C. 29; *Norvell v. McHenry*, 1 Mich. 227; *Jones v. Lewis*, 8 Ired. 70.) The fact that the case was then pending in this court on appeal made no difference. (*Camden v. Bloch*, 65 Ala. 236; *Perry v. Adams*, 83 N. C. 266; *Welch v. Damon*, 11 Gray, 383; *Sham burg v. Noble*, 80 Pa. St. 158.)

THAYER, J. — This appeal is from a judgment of the Circuit Court for the county of Multnomah, rendered in favor of the respondent against the appellant in certain garnishee proceedings.

It appears from the transcript that on the 13th day of May, 1885, the respondent, a private corporation, commenced an action at law against one L. H. Frank, in said court, to recover

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a debt of some \$378.57, due from the latter to the former, and thereupon sued out a writ of attachment, which was issued on the next day. The attachment is in the usual form. The sheriff to whom the writ was delivered certified thereon as follows:—

“I hereby certify that I received the within writ of attachment on the 14th day of May, 1885, and executed the same on the 14th day of May, 1885, at Portland, in the county of Multnomah, in said State, by serving a garnishment upon Koshland Bros., as required by law, garnishing all debts, property, moneys, rights, dues, credits of every nature in their hands or under their control, belonging or owing to the said L. H. Frank, to which the said Koshland Bros. made an answer thereto, said answer being hereto attached and made a part of this return.”

The answer referred to is as follows:—

“I hereby return that we have no property in our hands at this time, nor have we any property, debts, money, dues, credits of any kind or nature belonging to L. H. Frank.

[Signed]

“KOSHLAND BROS.”

There seems to have been a notice signed by the sheriff, directed to said Koshland, to the effect that, by virtue of said writ of attachment, all debts, etc., as mentioned in said return, had been attached and garnished, and that said answer was indorsed thereon. Said notice bore date the 14th day of May, 1885. Upon June 1, 1885, the said Circuit Court gave judgment in said action at law in favor of said respondent, and against said Frank, for the amount of said debt, and on the 9th day of June, 1885, on motion of the respondent's attorneys, the judgment was amended by the insertion of a further adjudication, to the effect that the property of said Frank taken under writ of attachment be sold to satisfy said judgment.

Prior to the date of the amendment, on the 6th day of June, 1885, the respondent's attorneys made and filed an affidavit showing that said action at law had been commenced; that the judgment therein had been recovered on said 1st day of June, 1885; that on the 14th day of May, 1885, the said writ of attachment had been issued, and in which it was stated that garnishee process was duly served upon said Koshland Bros.,

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and answer was made by them as before mentioned; that said answer was unsatisfactory to respondent, and that it was of the opinion and belief that Koshland Bros. had sufficient property in their possession and under their control belonging to said Frank to satisfy said judgment, which property was described in said affidavit, and wherein said attorney asked for an order citing the garnishee, as he termed him, to appear and be examined under oath. The circuit judge, it appears, on the same day, upon the said affidavit, made the following order:—

“It appearing to my satisfaction, upon the plaintiff’s affidavit herein, that Koshland Bros. have property of the defendant L. H. Frank, I hereby order that said Koshland Bros. appear before me at Circuit Court, Department No. 1, on the 13th day of June, 1885, to answer concerning the same.”

The affidavit and order were served upon Alfred F. Sears, Jr., an attorney of the said court, who admitted service thereof in writing in the following manner:—

“STATE OF OREGON, }
COUNTY OF MULTNOMAH. } ss.

“Due and legal service of the within affidavit, together with copy of same, served upon me this 6th day of June, 1885, in this county and State.

“ALFRED F. SEARS, Jr., of garnishee’s attorneys.”

(Same venue.) “Due and legal service on me of the within order, together with copies of the same, this 6th day of June, 1885, within this county and State, is hereby acknowledged.

“ALFRED F. SEARS, Jr., of garnishee’s attorneys.”

On the 10th day of June, 1885, the said respondent’s attorneys filed in the office of the clerk of the said Circuit Court, written allegations in the form of a complaint, in which, among other things, is alleged the issuance of the said attachment, the service of a certified copy thereof, together with a notice upon said Koshland Bros.; whereby all debts, etc., as mentioned in said return, were duly levied upon and garnished to satisfy said judgment, and the making of the answer thereto of said Koshland Bros., which is hereinbefore set out. It is further alleged in said allegations that said Koshland Bros. had property in

their possession belonging to said Frank, and that they were holding the same to hinder and delay, etc., said Frank's creditors. Said attorney also filed a list of interrogatories propounded to said Koshland Bros., regarding said property with said complaint, and upon which complaint and interrogatories was an admission of service by the said Alfred F. Sears, Jr., in the same form as upon said affidavit and order. No answer was filed to said allegations or interrogatories; and afterwards, and on the 29th day of June, 1885, the said Circuit Court gave judgment in favor of the respondent and against M. Koshland, who, I understand, is Koshland Bros., for want of answer, in the sum of \$378.57, which is the judgment appealed from.

The appellant's counsel contended, upon the argument, that the said order should have been served upon the garnishee personally, and that no jurisdiction was acquired over the person of the garnishee by the service made upon Mr. Sears. There is no doubt about the correctness of that position; and it was conceded by the respondent's counsel upon the argument. But the latter insisted that said garnishee voluntarily appeared in the proceeding, and thereby gave the said court jurisdiction. That an attorney should attempt to serve original process in any case, except in the manner pointed out by the Civil Code, is very strange, indeed. Koshland was the party required to answer concerning the property, and disobedience to the order would subject him to punishment for contempt. He was the only party to be served, and nothing less than personal service upon him should have been permitted. The first step to be taken in the proceeding was to bring him into court. After the order was allowed, the proceeding had a distinct character, and it was just as important to make personal service of process in such case as in that of the commencement of an action or suit. The service of the summons in the latter proceeding could as well be dispensed with as that of the order in the former. If it did not appear affirmatively that Mr. Sears was, in fact, the garnishee's attorney, that they both were before the court when a motion was made for judgment and the matter was continued, as shown by the *nunc pro tunc* journal entries, for several days, upon Mr.

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Sears' application, and ample time given the garnishee in which to answer the allegations and interrogatories referred to, I should be in favor of a prompt reversal of the judgment, for a defect of service of the order. But it seems to me that that, under the circumstances of the case, was equivalent to personal service.

The appellant's counsel claim that an appearance in such case can only be made in the mode pointed out in the Code, section 520, and that it requires a formal notice in writing to constitute such appearance. That would doubtless be so if the right of an attorney to be heard in an action, suit, or proceeding were challenged by the opposing party, but where the right is conceded, the attorney has been heard, and the client has had the benefit of the hearing, the latter would not be in a very favorable position to claim that the appearance was unauthorized. The adverse party might have objected to the appearance, or have waived the objection, and if he chose to take the latter course, his opponent ought not to be allowed to complain. It is very seldom that any formal notice of appearance is served upon the opposite party in any case; and when an attorney is authorized to manage a party's legal business, and has done so, and his adversary has made no objection on account of his neglect to give written notice of appearance, the party should certainly not be permitted to take advantage of the informality.

It was urged upon the part of the appellant that the record of the court could not properly be corrected after the adjournment of the term, so as to show that he appeared by attorney at the time before referred to. It is generally agreed that courts have a continuing power over their records not affected by the lapse of time, and the more liberal rule recognizes the right to resort to any satisfactory evidence within their reach in order to ascertain the accuracy of such records. I can discover no good reason why a court cannot at any time, when the rights of third parties are not involved, so amend its records as to make them conform to the truth. There had been a neglect in this matter to record the full proceedings had when the first application was made for judgment hereon for want of answer, and the court.

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very properly ordered the record amended in that particular. At least I can discover no impropriety in doing it.

The more serious question in the case involves the right of the court to give judgment against the appellant on the garnishee proceedings. I was very strongly impressed in the outset that there had been no legal service of the said attachment. Subdivision 3 of section 147 of the Civil Code, provides how property shall be attached when in the hands of a third person. A certified copy of the writ and a notice *specifying* the property attached must be left with such third person.

I could not understand how such a notice could be given unless the sheriff was able to identify the property, and was loth to believe that a notice to the effect that the sheriff had attached all the debts, property, etc., as mentioned in said notice, delivered to the appellant, would answer the requirements of the statute, when it did not specify the property attached. But I find that the court of appeals of the State of New York, in *O'Brien v. Mechanics & Traders F. Ins. Co.* 56 N. Y. 52, has held that such a service under a similar statute is valid. It appears that the question was for a long time a mooted one in that State, but that said decision has fully settled it. I am satisfied that the construction given in *O'Brien v. Mechanics & Traders F. Ins. Co.* renders the statute upon the subject more effectual, and I am inclined to follow it, though it has the appearance of judicial legislation.

The proceedings in such a case are specifically pointed out in the Code of 1872, and the respondent appears to have complied with the law as it then stood. It authorized a plaintiff in such a case, when the certificate given by the person alleged to have property of the defendant in his possession was unsatisfactory, to apply for an order requiring such person to appear and be examined on oath concerning the same, and to serve upon him written allegations and interrogatories touching any of the property liable to attachment as the property of the defendant; and if he failed to answer, the plaintiff, among other things, could at any time after the entry of the judgment against the defendant in the action, have judgment against the garnishee for want

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of such answer. (Civ. Code, §§ 162-164.) But the Act of October 25, 1878, providing that if judgment be recovered by the plaintiff, and it appear that property has been attached in the action, the court shall order and adjudge the property to be sold to satisfy the plaintiff's demands, and if execution issue thereon, the sheriff shall apply the property attached by him, affords another remedy.

Under that act the property may be sold upon execution issued on the judgment in the main action, and the respondent availed itself of the benefit of the provision as shown by the amended judgment entry of June 9, 1885, adjudging that the property of the defendant taken under the writ of attachment be sold to satisfy said judgment. By that entry the respondent secured every right in the premises it was entitled to. After obtaining a judgment for the sale of the property to satisfy the debt, it was not entitled to a general judgment against the garnishee for the value of the identical property. That would be repugnant to sense and justice. I think the Act of October 25, 1878, has superseded the provision in the garnishee proceedings authorizing the entry of judgment against the garnishee, and that the latter proceedings are only effectual as a means of discovery. Proceedings of that character being statutory, will not be extended by implication. The remedy given by the latter statute in the particular case referred to is a complete substitution for that given in the prior one, and if the two were allowed to stand would lead to absurdity and injustice, as the proceedings in the case under consideration fully prove. After the respondent obtained a judgment that the property attached be sold to satisfy the debt, the court certainly had no right to render a general judgment against the appellant for the amount of the debt. The two proceedings were for the same purpose, to reach the said property or its value, and apply it to the payment of the debt; and when it had been effectually reached in the action the garnishee proceedings were terminated as completely as they would have been had the defendant Frank come forward on the 9th day of June, 1885, and paid off the judgment against him.

I can see no alternative but that the judgment against the

Statement of Facts.

appellant must be reversed. The respondent will still retain its remedy under the judgment against the said defendant. The system under the two statutes is complete under this construction. The garnishee proceedings can be used in such a case as a means of discovery, and when the property attached is fully identified, a judgment can be taken in the action against the defendant therein for the amount of the debt, and for a sale of the attached property to satisfy it.

The judgment appealed from is reversed, with costs.

LORD, J., concurs.

The chief justice took no part in the decision.

[Filed November 17, 1885.]

W. H. ANDRUS v. A. J. & LEVI KNOTT.

TIDE LANDS.—The term "tide lands" applies to lands covered and uncovered by the ordinary tides, which the State owns by virtue of its sovereignty, and corresponds with the shore or beach, which at common law is that land lying between ordinary high and low water mark.

ID.—It must be such land as is alternately covered and left dry by the ordinary flux and reflux of the tides.

ID.—**NAVIGABLE WATERS.**—Lands adjacent to navigable waters, where the tide flows and reflows, come within the description, but it cannot be said to apply to lands which are covered with water three fourths of the year.

THE premises in controversy are situated on the margin of the Willamette River at East Portland. At this point, at a low stage of the river, there is a tidal rise and fall of two feet and eight inches, which daily covers and uncovers a space of shore from thirty-seven to fifty feet, during a period of about five months in the year. (Testimony of W. S. Chapman and map.) But as the river rises the space of shore which is alternately covered and uncovered by the ebb and flow of the tide becomes narrower, until at extreme high water the tide rises and falls but a few inches. No part of this shore is daily covered and uncovered by the ebb and flow of the tide during the whole year, the place where the alternate covering and uncovering

12	601
13	812
15	261
8*	733
10*	421
14*	417

12	501
25	162
8*	763
35*	203

12	501
40	250
12	501
146	173

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takes place shifting with the rise and fall of the water in the river. Upon this ground the Circuit Court held that such land was not tide or overflowed land under the Act of October 26, 1874, granting the title of the State in any tide or overflowed lands upon the Willamette River to the owners of the abutting lands.

E. B. Watson, and Seymour W. Condon, for Appellant.

It is plainly intended by the Act of October 26, 1874, to grant some lands; and as lands of this class were all the State owned, at the time, answering any part of the description or coming within the policy of the act, the conclusion is inevitable that they are the lands intended to be granted by the act. The authorities sustain this view. (*Walker v. Marks*, 2 Sawy. 152; *People v. Davidson*, 30 Cal. 380; *Rondell v. Fay*, 32 Cal. 364.)

H. T. Bingham, and Benton Killin, for Respondents.

The donation claimant, whose claim is bounded by a meandered stream, which the Willamette River is, owns everything in the river bed, except the public right of navigation, and the State as trustee of that right cannot give it away, but must hold it perpetually in trust for the public. (*Railroad Co. v. Schurmeir*, 7 Wall. 272.) In *Hinman v. Warren*, 6 Oreg. 408, this court says tide-lands are "those that are uncovered and covered by the ebb and flow of the sea." And the court by the authorities referred to to sustain its position, evidently meant the mean or daily ebb and flow of the tide. (*Pollard's Lessee v. Hagan*, 3 How. 230; *Barney v. Keokuk*, 94 U. S. 324.)

LORD, J. — The action was in ejectment. It was brought to recover certain lands claimed to be tide-lands. The court below held that the land in controversy was not such land. It is clear unless the land in dispute is tide-land, or comes within the description of such lands, it is unnecessary to consider the other legal propositions which counsel have discussed as applied to such lands. What is meant by the phrase "tide-lands"? In *Rondell*

Points decided.

v. Fay, 32 Cal. 354, it was held that the descriptive phrase "tide-lands," in the legislation of that State, applies to land covered and uncovered by the ordinary tides, which the State owns by virtue of its sovereignty. (*People v. Davidson*, 30 Cal. 380; *Walker v. Marks*, 2 Sawy. 152.) It would seem to correspond to or be synonymous with "shore" or "beach," and this, at common law, is that land which lies between ordinary high-water mark and low-water mark. (Hale De Jur. 12; Hall Sea Shore, 9; *Bludell v. Catterall*, 5 Barn. & Ald. 292.) It must, then, be such land as is affected by the tide, that lies between ordinary high-water mark and low-water mark, and which is alternately covered and left dry by the ordinary flux and reflux of the tides. Lands adjacent to *navigable* waters, where the tide flows and reflows, which at high tides are submerged and at low tides are bare, come within such description. (*Bell v. Gough*, 23 N. J. L. 683.) It can hardly be considered as including any ground that does not come within the provisions of this description. It is needless to say that lands covered with water three fourths of the year cannot be considered as such:

The judgment must be affirmed.

[Filed November 17, 1888.]

H. S. SCHNEIDER *v.* S. S. WHITE.

PLEADING—COMPLAINT.—A complaint which alleges that D rented a store to the defendant at his request for ten days, for which defendant promised to pay plaintiff the reasonable value, and further alleging the reasonable value and non-payment, states a cause of action.

ID.—CONSIDERATION.—An action can be maintained by A upon a promise by B, on a consideration moving from C, to pay A a sum of money, even though not informed thereof until afterwards.

MULTNOMAH COUNTY. Defendant White appeals. Reversed.

The opinion states the facts.

A. Lenhart, for Appellant.

F. V. Drake, for Respondent.

12	503
226	189
226	442
8*	652
37*	713
38*	621
12	503
34	312

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THAYER, J.—The only question in this case which the court deems of sufficient importance to be noticed, is whether the complaint in the Justice's Court contained a cause of action. The following is a copy of the said complaint:—

“Plaintiff for cause of action against defendant alleges that *during the year 1884, James Dickson, at the special instance and request of defendant, rented to defendant one store for the period of ten days, which rent was of the reasonable value of ten dollars, and for which defendant promised and agreed to pay to plaintiff the reasonable value thereof, and that the reasonable value thereof was and is ten dollars, and that no part thereof has been paid, although demanded; that said Dickson assigned to plaintiff said claim on December 8, 1884, and that there is now due and owing from defendant to plaintiff the sum of ten dollars, over and above all legal claims and set-offs.*”

The only objection urged against the complaint was that the defendant promised and agreed to pay the plaintiff the rent, instead of agreeing to pay it to Dickson. I have no doubt that the pleader intended to allege that the defendant promised and agreed to pay the rent to Dickson. That would have been more natural. Having rented the premises of the latter, he would have been more likely to have promised to pay him the rent. But taking the complaint as literally true, I think, beyond doubt, it contained a cause of action. The defendant, for a valuable consideration moving from Dickson, promised to pay the plaintiff a sum of money, and the latter can enforce it. That an action can be maintained by A upon a promise made by B upon a consideration moving from C to pay A a sum of money, even though A was not informed thereof until afterwards, is too well settled to require authority to support the proposition.

The judgment of the Circuit Court will therefore be reversed, and the cause remanded to that court, with directions to dismiss the writ of review.

Argument for Appellant.

[Filed November 19, 1885.]

OCTAVE NORMANDIN v. E. GRATTON.

ACCOUNT STATED—SETTLEMENT—EFFECT OF.—A settlement between parties is *prima facie* to be deemed a settlement of all demands, but is not conclusive, and is no bar to a recovery for matters not included in it, though existing at the time.

Id.—EVIDENCE.—In an action upon such an account evidence may be admitted to show that certain transactions between the parties prior to the settlement were not included in it. Such evidence does not go to impeach the account.

ACTION upon an account stated and also upon a promissory note from defendant to plaintiff which had matured prior to the date of said settlement. The answer admitted the settlement, but alleged payment, and further "that at the date of the account stated of July 31, 1883, the note was long past due." On the trial the defendant showed payments of money to the plaintiff exceeding the amount of his demands. The plaintiff being called in rebuttal was asked to "state whether or not the note in controversy was included in the account stated of July 31, 1883," and also "was it (the payments above referred to) paid to you on any matters that are included in this suit, or was it on matters outside of this suit." Both questions were duly objected to as incompetent, and the rulings of the court permitting the witness to answer are alleged as error.

X. N. Steeves, for Appellant.

The note sued on was due respondent before and at the time of this settlement, and the presumption of the law is that the note was included in the settlement. (*Smith v. Tucker*, 2 Smith, E. D. 193.) Before the respondent can offer evidence to contradict the settlement he must allege fraud or mistake. (*Hager v. Thomson*, 1 Black, 80; *Bullock v. Boyd*, 2 Edw. Ch. 293; *Levi v. Karrick*, 13 Iowa, 344; *Smith v. Bissell*, 2 Greene, G. 379.) An account stated is presumed to include all previous transactions. (*Dutcher v. Porter*, 63 Barb. 15; *Dorsey v. Kollock*, 1 N. J. L. 35.) If plaintiff desired to show that the payments made to him were to be applied upon other matters he should have so pleaded, as this was matter of confession and avoidance. (*Brown v. Perry*, 14 Ind. 32; *Brazill v. Isham*, 1

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Smith, E. D. 437.) It is too late to apply the payments at the trial. (*Baker v. Stakpole*, 12 Serg. & R. 301; *Harker v. Conrad*, 14 Am. Dec. 691, n.) And the application must be to a valid and legal claim. (*Brady v. Hill*, 1 Mo. 315.)

Alfred F. Sears, Jr., for Respondent.

This question and answer was a proper matter for the consideration of the court. By his answer the defendant relied upon a merger of the note in the account stated of July 31, 1883. In order to show that it was not included, this question was properly asked and the answer properly received. (*Dorsey v. Kollock*, 1 N. J. L. 35; *Ryan v. Rand*, 26 N. H. 13; *Nichols v. Scott*, 12 Vt. 47.) And the fact that the plaintiff had the note in his possession was another circumstance. (*Dorsey v. Kollock*, *supra*; Code, § 766, subd. 11.) The second error assigned by the appellant was in the court permitting the following question to be answered, which was propounded to the plaintiff as a witness, when called in rebuttal: "Was the \$676.70 paid to you on any matters that are included in this suit, or was it on matters outside of this suit?" Answer. "It was on matters outside of this suit." Why was not this a proper question? The defendant had testified to payments made by him to the plaintiff; why had not the plaintiff a right to show on what these payments were made? He was the creditor, the debtor had made no applications of payment; this gave him a right to make the application.

LORD, J.—The question asked and answered by the witness was evidence tending to rebut the presumption of the settlement alleged, including all demands between the parties, and was admissible. It is conceded that a settlement between the parties is *prima facie* to be taken as a settlement of all demands, but is not conclusive, and is no bar to a recovery for matters not included in the settlement, though existing at the time. (*Nichols v. Scott*, 12 Vt. 47; *Ryan v. Rand*, 26 N. H. 15.) The object of the question was to show that the matter referred to was not included in the account stated, and thus rebut the presumption

Points decided.

that it included all previous transactions. (Whart. Ev. § 1331, notes.) As such the question was admissible, and the objection was properly overruled. It is true the answer might have been more explicit and specified the transactions with more particularity, but in failing to develop this, the plaintiff saw the risk of this evidence proving unsatisfactory for the purpose offered. And yet, if it was unsatisfactory to the adverse party, he had the opportunity of cross-examination, and could have compelled a further explanation. As it was, the parties were content to submit the matter to the tribunal whose province it was to adjudge the fact, and as this resulted adversely to the appellant, it is not perceived how we can remedy it. To impeach an account stated, either fraud or mistake must be shown to exist; but that is not the question involved in this case. In respect to the note, it is sufficient to say that the same principle already discussed is applicable to it.

Upon this record we cannot do otherwise than affirm the judgment.

[Filed November 23, 1885.]

J. K. GILL & CO. v. L. H. FRANK, M. KOSHLAND,
GARNISHEE.

12	607
88	164

ATTACHMENT.—An attaching creditor is to be deemed a purchaser in good faith and for a valuable consideration from the date of the attachment.

WAREHOUSEMAN—WAREHOUSE RECEIPT—ASSIGNMENT—EFFECT OF.—When by a warehouse receipt it is agreed to deliver the property to anyone to whom the receipt may be indorsed as to one or *his order*, a symbolical delivery of the property may be effected by transfer of the receipt, and the warehouseman in such case becomes bailee to such transferee.

ID.—But when a warehouseman by his receipt restricts his undertaking to delivery of the property to his bailor personally, a change in the possession of such property, so that his custody would become the possession of a stranger, cannot be effected without his consent. (*Solomon v. Bushnell*, 11 Oreg. 277, distinguished.)

MULTNOMAH COUNTY. The garnishee appeals. Affirmed.

The facts are stated in the opinion.

Alfred F. Sears, Jr., and Raleigh Stott, for Appellant.

Argument for Respondent.

A transfer of a warehouse receipt operates as a transfer of the property in the hands of a warehouseman. The delivery of the receipt is the delivery of the goods. (*Solomon v. Bushnell*, 11 Oreg. 277.) But slight proof of a delivery is required. (Smith Const. pp. 8-10; 2 Greenl. Ev. § 297, Redfield's ed.) Any act which shows that the vendor intended to part with his control over the property, his legal title thereto, suffices. (*Potter v. Washburn*, 13 Vt. 558; 37 Am. Dec. 615.) The legislative assembly of the State of Oregon passed an act making warehouse receipts negotiable. This act went into effect on the 23d day of May, 1885, and was the law at the date the warehouse receipt and assignment were offered in evidence. It then being a negotiable instrument, all that was required was to offer the receipt and assignment and prove the signatures. (*Sawyer v. Warner*, 15 Barb. 282; 1 Daniel Neg. Inst. 3d ed. 717, n.) To this it may be answered that this was not the law at the date of the transfer. But this is no answer, for the legislature has the right to alter or change the rules of evidence. (Cooley Const. Lim. 3d ed. p. 288, and authorities cited.)

M. G. Munley, and E. B. Watson, for Respondent.

There was no proof of the delivery of the assignment to Gross. The assignment itself is no proof of such delivery. The recitals in it, "for value received," etc., are not evidence against third parties. (2 Wharton Law of Ev. § 1041, n. 4; *Hill v. Draper*, 10 Barb. 454; *Sharp v. Speir*, 4 Hill, 76.) The legal presumption on the facts testified to by the garnishee's witness, Bernheim, is that the judgment debtor, L. H. Frank, continued in possession of the warehouse receipt with the assignment indorsed thereon until it came back again into Bernheim's hands. (2 Wharton Law of Ev. § 1284.) That a delivery of the warehouse receipt is necessary, where there is no actual delivery of the property itself, to pass the title, is well settled. (*Buffington v. Curtis*, 15 Mass. 528; *Allen v. Williams*, 12 Pick. 297; *Whittle v. Skinner*, 23 Vt. 531; *Palmer v. Merrill*, 6 Cush. 282; *Risley v. Phenix Bank*, 83 N. Y. 328.) Assignment by indorsement and delivery of the warehouse receipt passes no

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interest in the contract, but only the title to the property. (*Solomon v. Bushnell*, 11 Oreg. 277.)

LORD, J.—This is an appeal from a judgment in favor of the plaintiffs, by M. Koshland, the garnishee. The bill of exceptions shows that at the trial the plaintiffs introduced testimony tending to prove that the garnishee had property in his possession belonging to the judgment debtor, at the time of the garnishment, of the value of \$1,400, and rested. The garnishee then introduced A. Bernheim as a witness in his behalf, who testified that he was the garnishee's agent and manager at his warehouse when the garnishment was made; that he received the property in litigation from the judgment debtor, and gave a warehouse receipt therefor, which was afterwards returned to him, but that it was not returned to him by Frank to whom it was issued, nor by Gross, to whom, by an indorsement on the back, it purported to be assigned. The garnishee offered the warehouse receipt with the assignment indorsed thereon in evidence. The plaintiffs objected on the ground and to the effect that the receipt and the indorsement purporting to be an assignment thereof showed no delivery to Gross, which the court sustained. The correctness of this ruling is the only ground of alleged error it is necessary for us to consider. The contention of the appellant is that a transfer of a warehouse receipt operates as a transfer of the property in the hands of a warehouseman, and the delivery of the receipt is the delivery of the goods, and consequently, that the receipt and indorsement was evidence of the fact that Frank was not the owner of the goods. Before applying the principles of law which, we conceive, are applicable to the case, it is well to note the facts to which they are to be applied. The warehouse receipt given by the garnishee and bailee to Frank, and purporting by its indorsement thereon to have been assigned by Frank to Gross, was a plain undertaking to deliver to Frank, his bailor, personally, the parcels of goods therein enumerated, upon the payment of certain charges, etc. It is without the words "or order," or any other form of words which may be construed into an agree-

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ment or offer of the garnishee to hold the goods intrusted to his care for anyone else. The evidence of the managing agent of the garnishee further shows that the receipt with its indorsement somehow came back into his possession, but how and in what way he does not know, except that he is certain it was not returned to him either by Frank or Gross, to whom it purported to be assigned. In the light of all the facts, the inference is very strong, there never was any delivery of the assignment to Gross. Howsoever the return of the receipt may have been effected, the probabilities are it was for the purpose of having the transfer of the property accomplished through a new warehouse receipt. If this be true, it shows that the parties did not expect or understand any change in the possession of the property would take place by force of the assignment, without the consent of the bailee. Nor is there any other construction which can be given to the facts as disclosed, that would be consistent with the contract of bailment, without subjecting the appellant to unfavorable criticism. It must be noted that as against third persons an attaching creditor is to be regarded as a purchaser in good faith and for a valuable consideration, and in order to defeat his right in the premises there must be such a change of possession or delivery of the goods as passes the property. When the terms of the receipt are such that the warehouseman offers or undertakes to deliver the property to whomsoever that receipt may be indorsed, a symbolical delivery may be effected by its assignment or delivery, and he becomes bailee to such assignee in accordance with the terms of his contract. In such case, a delivery of the receipt is a symbolical delivery of the property itself. But when a warehouseman accepts the custody of property, and by his receipt as bailee restricts the promise or undertaking to deliver the property to his bailor personally, and upon the condition of the payment of charges, etc., a change in the possession of such property cannot be effected, so that his custody should become the possession of a stranger, without his consent or the violation of his agreement. He has got the possession of the goods, and his assent is necessary to effectuate a change in such possession whether the

receipt is assigned or not. When it is proposed, therefore, to give an assignment the effect of a delivery of the goods as against an attaching creditor, the receipt and its assignment, taken together, ought to be broad enough at least to authorize such a construction. It may not be amiss to observe that there is an important distinction between this case and *Solomon v. Bushnell*, 11 Oreg. 277. There the wheat receipt was in a form to authorize the construction given to it upon well settled principles of law. It contained an express promise or undertaking of the warehouseman to his bailor "to deliver to his order," with usual conditions as to damages by fire and charges for storage. There was, therefore, no difficulty in construing its terms, when indorsed and delivered, as a symbolical delivery of the property itself, and consistently with commercial usage as applied to other documents not negotiable in the technical sense. In *Hallgarten v. Oldham*, 135 Mass. 1, Holmes, J., ably examines this subject, and although the rule adopted in that State, as to delivery, when applied to an attaching creditor is, probably, more strict than here, the principles of law which he applies to receipts of the character under consideration is peculiarly in point. He said: "The question is, then, how the transfer of any document can have that effect. The goods are in the hands of a middleman, and they remain there. A true change of possession could only be brought to pass by his becoming the servant of the purchaser for the purpose of holding the goods, so that his custody should become the possession of the master. But this is not what happens, and it has been held that less would satisfy the law. A carrier or warehouseman in this case is not the servant of either party *quoad* the possession, but a bailee holding in his own name, and asserting a lien for his charges against all parties. He has possession of the goods, whether the document is transferred or not. But it has been held that the principle of the rule requiring a delivery is satisfied although the letter of it is not, if the possessor of the goods becomes the purchaser's bailor. (*Tuxworth v. Moore*, 9 Pick. 347; *Russell v. O'Brien*, 127 Mass. 349-354; *Dempsey v. Gardner*, 127 Mass. 383.) Now it is obvious that a custodian

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cannot become the servant of another in respect of his custody except by his own agreement. And *a fortiori* when that custodian does not yield, but maintains his own possession, it is clear that his custody cannot enure to the benefit of another, as if it were the possession of that other, unless the bailee consents to hold for him subject to his own rights. The only way, therefore, in which a document can be a symbol of goods in a bailee's hands, for the purpose of delivery to a purchaser, is by showing his consent to become the purchaser's bailee. It may or may not be true that, if a warehouse receipt contains an undertaking to deliver to order, that undertaking is to be regarded as an offer by the warehouseman to any who will take the receipt on the faith of it, and that it will make him warehouseman for the indorsee, without more, on ordinary principles of contract. That is the argument of Benjamin on Sales, 676, *et seq.*, criticising *Farina v. Home*, 16 Mees. & W. 119, and Blackburn on Sales, 287. But the criticism and case agree in the assumption that the only way in which an indorsement of a document of title can have the effect of a delivery is by making the custodian bailee for the holder of the document, and that he cannot be made so otherwise than by his consent. The necessity for notice, in those cases where notice is necessary, stands on the same ground. If the custodian has not assented in advance, he must assent subsequently; and the principle is the same whether an express acceptance of a delivery order be required, or it is held sufficient if he does not dissent when notified. (*Boardman v. Spooner*, 13 Allen, 353, 357; *Carter v. Willard*, 19 Pick. 1-3; *Bentall v. Burn*, 3 Barn. & C. 423.) When a private warehouseman, who has an unfettered right to choose the person for whom he will hold, gives a receipt containing only an undertaking to his bailor personally, without the words "or order," or any other form of offer or assent to hold for anyone else, it is impossible to say that a mere indorsement over of that receipt will make him bailee for a stranger. He has not consented to become so, even under the principles argued for by Mr. Benjamin. And until he has consented to hold for some one else he remains the bailee of the party who

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intrusted him with the goods." In the case at hand the court was called upon to say whether the instrument as indorsed brought about a constructive delivery of the property. The evidence which preceded failed to show any delivery of the receipt as indorsed to Gross, or to account for its possession in the hands of the bailee, except in a way which strengthened the assumption that there was no delivery of it to Gross, and in the absence of anything to show assent of the custodian of the property to hold it for any other, the legal construction of its terms, as regulated by well-settled rules of law, necessarily excluded its introduction in proof of the fact of delivery. It was, therefore, inadmissible to show a symbolical delivery as against an attaching creditor.

As this action was commenced and the rights under it accrued prior to the recent act of the legislature making warehouse-receipts negotiable, it has no application to the case. The judgment is affirmed.

[Filed November 30, 1885.]

I. R. DAWSON v. JAMES COFFEY ET AL.

ASSIGNMENT FOR BENEFIT OF CREDITORS—WHEN SET ASIDE—EQUITY.—A general assignment for the benefit of creditors, when made in fraud of the insolvent law, may be set aside in equity; but in such case the creditor must first obtain a judgment upon his claim, or in some manner secure a lien upon the debtor's property.

ID.—ATTACHMENT—GARNISHMENT.—When a debtor attempts to dispose of his property to defraud his creditors, the latter may attach it by taking it from the debtor, or by garnishment if in the hands of a third party, and this even in case of a general assignment for the benefit of creditors if it be fraudulent.

ID.—EQUITY—CREDITOR'S BILL—WHEN MAY BE BROUGHT.—In such case the creditor may recover a judgment at law, and after exhausting the ordinary legal remedies to enforce payment, may commence a creditor's bill to obtain satisfaction of his claim.

ID.—AUXILIARY JURISDICTION.—Equity will lend its aid to prevent an attempted fraud on creditors by means of an insolvent law, but not, ordinarily, until the legal remedies are exhausted. The jurisdiction is only auxiliary, except in certain cases where a fund has been set apart in some manner to the payment of a particular class of debts.

ASSIGNMENT—CLAIM OF CREDITOR—EQUITY JURISDICTION.—Where an insolvent has made an assignment for the benefit of all his creditors under the

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insolvent law of this State, and the claim of a creditor has been presented to the assignee, and allowed under the provision of the act, these facts would entitle the creditor to resort to equity to prevent a fraudulent diversion and misapplication of the fund.

ID.—SIMPLE CONTRACT CREDITORS.—(Per WALDO, C. J.).—Simple contract creditors alleging a simple indebtedness to them cannot maintain a suit to set aside a conveyance on the ground of fraud. They must first establish their claim at law, and exhaust the remedies afforded by a court of law for its collection. This is a condition precedent to the jurisdiction of equity.

MARION COUNTY. Plaintiff appeals. Affirmed.

The facts are stated in the opinion.

W. H. Holmes, and S. T. Richardson, for Appellant.

We maintain that this suit is of equitable cognizance in the first instance, as it disposes of multifarious rights in one proceeding, thus preventing a multiplicity of actions. (Story Eq. Plead. § 285; Pom. Eq. Juris. §§ 245, 407; *Palen v. Bushnell*, 46 Barb. 25; *Tabb v. Williams*, 4 Jones Eq. 352; *Turner v. Adams*, 46 Mo. 95; *Richmond v. Dubuque & Sioux City R. R. Co.* 33 Iowa, 422, 487, 488; Pom. Eq. Juris. § 261, n. 1; *Boyd v. Hoyt*, 5 Paige, 65, 78; Pom. Rem. & Rem. Rights, § 470; *Worthy v. Johnson*, 8 Ga. 238.) The relief prayed for is a *pro rata* division of the assets of James Coffey between all of his creditors, as their rights may appear; it is a case where one party is suing for the benefit of all. (Wait Fraudulent Conveyances, § 69, n. 1; Paige, 104; 2 Barbour's Ch. Pr. p. 148; 12 Barb. 58.) The rule requiring a creditor to exhaust his remedy at law before bringing a creditor's bill does not exist in this State. (*Hodges v. Silver Hill Mining Co.* 9 Oreg. 200.) The conveyances by Coffey to Gilbert Bros. and to his wife were evidently made in contemplation of insolvency, and when he and they knew he was insolvent. This was a fraud not only upon his other creditors, but upon the assignment law of this State. (Pom. Eq. Juris. § 967, n. 1; Burrill Assign. § 6; *U. S. v. Bank of U. S.* 8 Rob. (La.) 262; *Burrows v. Lehnendorff*, 8 Iowa, 96; *Van Vleet v. Slauson*, 45 Barb. 317; *Kohn v. Salmon*, 3 West C. Rep. 383.)

Wm. M. Ramsey, for Respondent Coffey.

A suit of this character can be sustained only in aid of a judgment, and before a creditor can maintain such a suit he must previously have established his claim by a judgment at law. (Bump Fraud. Con. 521, 522; Bispham Principles of Equity, § 527; Wait Creditor's Bills, §§ 73, 140; 3 Pom. Eq. Juris. § 1411, and n.; *Smith v. R. R.* 99 U. S. 401; *Jones v. Green* 1 Wall. 331, 332.)

Tilmon Ford, for Respondents Gilbert Bros. and Minto.

The complaint admits that James Coffey, at the time he executed his chattel mortgage to the Gilbert Bros. on December 9, 1884, was justly indebted to them in the sum of \$650.50. This was two days before the assignment was made by Coffey to Downing, on December 11, 1884, and Coffey had the right to prefer the Gilbert Bros. to his other creditors if he chose to do so. (Bispham Principles of Equity, p. 339, § 244; Burrill Assign. p. 210, § 167; *Lord v. Fisher*, 19 Ind. 7.)

THAYER, J.—This case comes here upon appeal from a decree entered upon a decision sustaining a demurrer to a complaint.

It is alleged in the complaint that the respondent James Coffey had a stock of furniture and tobacco and cigars, and for a long time had been engaged in a general merchandise business, vending said articles; that he became indebted to divers parties, on account of said business, amounting to \$4,000, and was owing other liabilities amounting to \$700; that he was indebted to the respondents A. T. and F. N. Gilbert, partners, under the firm name of Gilbert Bros., in the sum of \$615.50, and that he owed, or pretended to owe, the respondent Johanna Coffey, who is the wife of said James Coffey, \$700; that he was insolvent, and contemplated insolvency, and while in that condition, and on the 11th day of December, 1884, he made a general assignment to the respondent Downing of all his property for the benefit of his creditors; that on the 9th day of December,

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1884, said James Coffey, being then insolvent and intending to make the said assignment, entered into an agreement with the said Gilbert Bros., whereby, and as a part of the same transaction with the said assignment, and for the purpose of preferring the said Gilbert Bros. in the payment of their said demand over other of his creditors, executed to the said Gilbert Bros. a chattel mortgage upon a large portion of his said property, consisting of the said furniture; that on the 10th day of December, 1884, said James Coffey, while in the condition mentioned, and intending to make the said assignment, entered into an agreement with his wife, the said Johanna Coffey, whereby, and as a part of the same transaction with said assignment, and with a similar design of preference of payment of her demand, executed to her a bill of sale of the said stock of tobacco and cigars, and put her in nominal possession thereof; that soon after the execution of said chattel mortgage to said Gilbert Bros., the respondent John Minto, acting for them, wrongfully took possession of the property included in the said chattel mortgage and converted it to their own use; that it was worth \$2,500; that at the time said James Coffey executed said chattel mortgage and bill of sale he was indebted in a large amount to divers persons on account of said business, as before mentioned; that said creditors last referred to assigned their claims to said appellant; that he has no property out of which to recover said claims, except the property included in said chattel mortgage and bill of sale, and that if the owner of said claims is compelled to take his distributive portion of said property in the hands of said assignee, and not allowed any portion of the property mortgaged and sold, as mentioned, he will not realize more than from five to ten per cent; that said assignee is acting in good faith so far as his said trust is concerned, but is powerless to question the validity of the said instruments; that the assignment to him was not made in good faith. Said complaint contained a prayer for an accounting for said property mortgaged and pretended to be sold, and that it be transferred into the hands of an officer of the court; that the said assignment be set aside, and the assignee account for the property in his hands and pay it over to such

officer, to the end that all the property of the said James Coffey, including that mortgaged and pretended to be sold to his wife, be distributed among the creditors of the said Coffey in accordance with equity, etc.

The demurrer to the complaint was upon two grounds, first, because they were two causes of suit improperly united; and second, because the said complaint did not state facts sufficient to constitute a cause of suit. The second ground is the more important one. It raises the question as to whether creditors at large, having mere legal claims against a debtor on account of ordinary contract debts, have a right to go into a court of equity to enforce them where the debtor has attempted to dispose of his property in order to defraud them.

That a general assignment for the benefit of creditors may be set aside when made in violation of the insolvent law there can be no question; but whether it can be done by an ordinary creditor of the insolvent before he has obtained a judgment upon his claim, or in some manner secured a lien upon the debtor's property, is more serious. I am strongly of the impression that he cannot. Where a debtor attempts to dispose of his property in any way, in order to defraud his creditors, they may proceed and attach by taking it from the debtor, or by garnishment, if in the hands of another party. They may pursue this remedy in case of a general assignment for the benefit of creditors, if it be fraudulent. (*Moss v. Humphrey*, 4 Greene, G. 443; *Burrows v. Lehndorff*, 8 Iowa, 96; *Ruble v. McDonald*, 18 Iowa, 493.) I cite these authorities with more confidence from the fact that our insolvent law was, to a great extent, taken from the Iowa law upon that subject. The creditors may also in such a case proceed and recover judgment at law, and after exhausting the ordinary legal remedy to enforce payment, commence a suit in equity in the nature of a creditor's bill to obtain satisfaction of their claims.

An attempt to defraud creditors through the means of the insolvent law is as mischievous as an attempt to effect it in any other way, and a court of equity would lend its aid to prevent it in that case as readily no doubt as in any other, but

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it would not exercise principal jurisdiction, would only furnish the creditor auxiliary assistance to obtain his right. It would never attempt to enforce the payment of contract debts except under particular circumstances. It must be a case where a fund has been set apart, or in some manner devoted to the payment of a class of debts, before equity will interfere, until the legal remedy is exhausted, such as, in a case of prize money made by a privateer and required by articles to be distributed (13 Ves. 397); the assets of a limited partnership, where the statute constituted them a special fund for the benefit of all the creditors of the partnership. (*Inness v. Lansing*, 7 Paige, 584, and the like cases.)

I think that in this case, if the appellant had proved his claim under the provisions of the insolvent act, he could then have resorted to equity to have had the fund applied to the payment of the debt, and to prevent a fraudulent diversion or misapplication of it. The assignment vests in the assignee the title to all property belonging to the debtor at the time of making the assignment. The statute as printed does not read so, but it is on account of typographical error. (See enrolled act.) After a creditor has presented his claim under oath as provided by the act, I think he would have such an interest in the assets of the insolvent as would enable him to enforce the remedy above suggested. He certainly ought to, after its allowance. But to have the assignment set aside and the court undertake to administer upon the estate as prayed in the said complaint would, to my mind, be an unprecedented proceeding. The creditor's claim must be adjudicated upon, or presented and allowed in the insolvent proceedings, before the aid of equity could be invoked.

I am of the opinion, therefore, that the decision sustaining the demurrer should be affirmed.

WALDO, C. J., concurring.—This is a suit brought in the interest of certain alleged creditors of James Coffey, to set aside certain conveyances of personal property made by Coffey to defraud, as alleged, the said creditors. There is a fatal objection

to the suit in its inception. The claims of the complaining creditors have not been reduced to judgments, and executions returned unsatisfied.

They are all simply contract creditors, alleging a simple indebtedness to them on the part of the alleged debtor. Such suits cannot be maintained. The ground of equitable jurisdiction in such cases is fraud in the disposal of the debtor's property, and which, unless equitable remedies are applied, will defeat the collection of the debt. But before the fraud can be set up, the legal facts which are conditions precedent must be established. That they must be established at law is implied in the nature of the facts themselves. It is exclusively the province of a court of law to say that there is a legal debt, and that it cannot be made at law. Therefore a creditor's bill "must be preceded by a judgment at law, establishing the measure and validity of the demand of the complainant for which he seeks satisfaction in chancery." (*Smith v. R. R. Co.* 99 U. S. 401. And see *Baxter v. Moses*, 77 Me. 465.) So in *Parish v. Lewis*, Freem. Ch. Miss. 306, the court say: "But if you wish to reach equitable assets, or other things not subject to execution at law, you must show that you have exhausted your remedies at law by a return of an execution unsatisfied, as the foundation of your right to come into this court. In such case, the complainant's right to relief in this court depends upon his having run his execution at law without being able to satisfy his judgment. It is not a mere technical objection, but goes to the very foundation of the suit, and is not waived even by a general answer. The complainant must show an execution returned unsatisfied, and no state of facts will excuse such a return." (*Brinkerhoff v. Brown*, 4 Johns. Ch. 671, 687; *McElwain v. Willis*, 9 Wend. 548; *Scriver v. Bostwick*, 2 McCord Ch. 416; *Hadden v. Spader*, 20 Johns. 554; *Moore v. Young*, 1 Dana, 516.)

Hodges v. Silver Hill Mining Co. 9 Oreg. 200, was not a suit to reach equitable assets of the debtor. There the stockholders were primarily liable in equity. Their liability may be likened to that of a guarantor after insolvency of the principal debtor,

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in which insolvency may be proved like any other fact in the cause of suit. (Pars. Notes and Bills, 142, and cases cited.)

The judgment must be affirmed.

[Filed November 30, 1885.]

I. S. HURST v. D. W. BURNSIDE.

QUESTIONS OF FACT—VERDICT OF JURY—ERROR TO BE CLEARLY SHOWN.—When the issue between the parties is mainly one of fact, the court ought not to disturb the finding of the jury, unless it is clearly shown that error was committed at the trial.

WITNESS—INTEREST—VALUE OF TESTIMONY.—Whether or not a witness attended the trial in obedience to a subpoena, or whether his fees were tendered him, or what distance he traveled to attend, are questions of no importance in determining the value of his testimony; and the jury would not be justified in drawing any inference therefrom, *aliter*, perhaps, as to whether he attended voluntarily.

ARGUMENT—LIMITING TIME FOR.—A statute providing that the whole time occupied in the argument of a cause shall not exceed two hours on either side, unless the court for special reasons shall otherwise permit, it is not error for the court against the will of a party to limit the argument to a shorter time. That statute is only a limitation upon the power of the court to extend the time for argument, unless for special reasons.

DAMAGES—CONTRIBUTORY NEGLIGENCE—INSTRUCTION TO JURY.—In an action for damages to an employee by reason of alleged defects in the machinery of a mill, it is not error to charge that "if the plaintiff knew the position, condition, and character of the machinery by which he was injured, and could reasonably have avoided the danger by approaching the same from the outward revolutions of the gear, and did not do so because he did not think or look, he was guilty of negligence precluding recovery. It was the duty of plaintiff when approaching machinery about which he was employed to both think and look, in order to avoid injury from such machinery, and if you find from the evidence that the injury sustained by plaintiff was received by reason of his failure to think or look as to what he was doing, he was guilty of such negligence as precludes recovery."

ID.—PRAYER FOR INSTRUCTIONS—FAILURE TO INSTRUCT.—Where the plaintiff claims that the facts showed an emergency which required such prompt and speedy action as would excuse him in a failure to exercise the same care and forethought that would ordinarily be required of a prudent man under similar circumstances, it is his duty to ask for an instruction appropriate to that theory of the case. Failing to do so it is not error in the court to omit to charge the jury upon that theory.

ID.—In every case the true test as to whether a party is chargeable with negligence is, whether the act was such that a man of ordinary prudence would have done it under all the circumstances.

A. S. Bennett, for Appellant.

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The objection to the instructions which we urge is that the court thereby charged the jury that the mere failure upon the part of plaintiff to think or look at what he was doing, would be such negligence upon his part as would absolutely defeat his recovery, without regard to the other circumstances of the case. The evidence showed that the plaintiff was comparatively inexperienced in mills; that he had been told to approach the shaft in the way he did; that the machinery had been previously heating, and that he smelled burning oil, and was in a great hurry to ascertain which shaft was heating at this particular time. The court had no right to take all these circumstances away from the jury and say to them, that if in the excitement of the moment he permitted his eyes to wander off to see if the oil was not dripping from some other shaft, that that was conclusive evidence of negligence. (*Wheeler v. Town of Westport*, 30 Wis. 413; *Meyers v. I. St. L. & R. Co.* 1 N. E. Rep. 899.) The inferences to be drawn from undisputed facts as well as the facts themselves are ordinarily for the jury. (*Sioux City & P. R. Co. v. Stout*, 17 Wall. 657; *Crissey v. H. M. & F. P. R. Co.* 75 Pa. St. 83; *Westchester & R. R. Co. v. McElwe*, 67 Pa. St. 311; *Penn. Canal Co. v. Bentley*, 66 Pa. St. 30; *Penn. R. Co. v. Barnett*, 59 Pa. St. 259; *P. & R. R. Co. v. Killips*, 88 Pa. St. 412; *Gaynor v. O. C. & N. R. Co.* 100 Mass. 212; *Mayo v. B. M. & R. Co.* 104 Mass. 137; *Wheelock v. B. & A. R. Co.* 105 Mass. 203; *Ireland v. O. H. & S. P. R. Co.* 13 N. Y. 533; *Ernst v. H. R. R. Co.* 35 N. Y. 38; *Belton v. Baxton*, 58 N. Y. 411; *Thurber v. H. R. R. Co.* 60 N. Y. 331; *Marietta C. R. R. Co. v. Picksley* 24 Ohio St. 668.) And this is especially true where reasonable men might draw different conclusions from the admitted facts. (*Thurber v. H. R. R. Co.* 60 N. Y. 331; *A. & H. R. R. Co. v. Bailey*, 11 Neb. 332; *Mares v. N. P. R. R. Co.* 21 N. W. Rep. 5; *Abbott v. C. M. & St. P. R. R. Co.* 30 Minn. 482; *Williams v. N. P. R. R. Co.* 14 N. W. Rep. 99; *Walsh v. O. R. & N. Co.* 10 Oreg. 260.) It is assumed that twelve men drawn from the different vocations of the community at large can draw a safer and wiser conclusion from undisputed facts than a single judge. (*Railroad Co. v. Stout*, 17 Wall. 657; *Davis v. Utah N.*

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S. R. Co. 2 Pacif. Rep. 521; *Solen v. V. & T. R. R. Co.* 13 Nev. 153; *Detroit & M. R. R. Co. v. Van Steinburg*, 17 Mich. 99; *Walsh v. O. R. & N. Co. supra.*) Instructions which virtually take the question of negligence or contributory negligence from the jury are error. (*Hynes v. S. F. & N. P. R. R. Co.* 4 Pacif. Rep. 30; *Meyers v. I. & St. L. R. Co.* 1 N. E. Rep. 899.) A party is not held to the same degree of care in cases of emergency as at other times. (*Lowery v. Manhattan Co.* 1 N. E. Rep. 608.) "If plaintiff's negligence is of a negative character, such as lack of vigilance, and was itself caused by or would not have existed, or no injury would have resulted from it, but for the primary wrong, it ought not in reason, and is not in law, to be charged to the injured one, but to the original wrong-doer." (*W. S. & L. & P. R. Co. v. C. T. Co.* 23 Fed. Rep. 741.) Slight negligence upon the part of plaintiff will not defeat recovery. (*Ward v. M. & St. P. R. R. Co.* 29 Wis. 148; *Otis v. Janesville*, 47 Wis. 422; *Hughes v. County of Muscatine*, 44 Iowa, 775; *Dimond v. Henderson*, 47 Wis. 172; *Palmer v. D. L. & N. R. Co.* 22 N. W. Rep. 88; *Strong v. S. & P. R. Co.* 61 Cal. 328; *Robinson v. W. P. R. R. Co.* 48 Cal. 422, 423; *Dufour v. Central Pac. R. R. Co.* 7 Pacif. Rep. 771; *Mabley v. Kittleberger*, 37 Mich. 363; *C. & A. R. R. Co. v. Murray*, 62 Ill. 326; *I. & S. T. L. R. R. Co. v. Stables*, 62 Ill. 313.) A bad charge can never be cured by a good one upon the same point. (*T. W. & W. R. Co. v. Schuckman*, 50 Ind. 42; *Clem v. State*, 31 Ind. 480; *C. & A. R. R. Co. v. Murray*, 62 Ill. 326; *Kingen v. State*, 45 Ind. 518.)

C. A. Dolph, for Respondent.

We submit that neither the questions asked witness (Miller) tended to prove any ultimate fact material to plaintiff's case. A witness is as much bound to attend at the trial of a cause, if served by a constable, as if served by a sheriff, and he is under the same obligations if served by any other person, or accepts or acknowledges service of the subpoena as if served by either. The restriction of cross-examination on immaterial matters is not a subject of exception. (*Hutchinson v. Methuen*, 1 Allen, 33; *Plato v. Kelly*, 16 Abb. Pr. 188; *Rand v. Inhabitants of*

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Newton, 6 Allen, 38; *Commonw. v. Shaw*, 4 Cush. 593.) It is the duty of an employee working in the vicinity of machinery to exercise his *thinking faculties*; if he fails to do so and is injured in consequence thereof, he is guilty of such negligence as prevents a recovery. (*Stone v. Oregon City Manuf Co.* 4 Oreg. 55; *Bruker v. Town of Covington*, 69 Ind. 33.) Where, as in this case, the plaintiff has been the actor in the affair in which the injury was received, and his acts *per se* would indicate negligence, he cannot recover without proof that he exercised ordinary care. (*Walsh v. O. R. & N. Co.* 10 Oreg. 250; *Grant v. Baker*, 12 Oreg. 329.) The complaint alleges that the accident occurred, because the *wheels were fastened upon the shafts by keys, etc.*, an objection going to the original construction of the mill. It seems plain that under such circumstances plaintiff assumed whatever risk was incident to working about machinery constructed in this particular manner, and that if the same was in fact dangerous it became his duty to use the greater care and diligence to avoid such danger. (*Mansfield Coal Co. v. McEnery*, 91 Pa. St. 189.) The master is under no higher duty to provide for the safety of the servant than the servant is to provide for his own safety. We submit the following authorities as fully sustaining the instructions assigned as error: *Thompson Negligence*, § 15, p. 1008; *Walsh v. O. R. & N. Co.* *supra*; *Jones v. Railroad Co.* 95 U. S. 439; *Pennsylvania Co. v. Lynch*, 90 Ill. 333; *Stone v. Oregon City Woolen Mills*, *supra*; *Galtz v. Winona R. R. Co.* 22 Minn. 55; *Devitt v. Pacific R. R.* 50 Mo. 305.

THAYER, J.—Appeal from the Circuit Court for the county of Multnomah, from a judgment rendered in an action brought by the appellant against the respondent, to recover damages.

It is alleged in the complaint in said action, in substance, that on the 11th day of March, 1883, and prior thereto, the respondent was the owner of, and engaged in running and operating a flouring mill at Oregon City, Oregon; that on said date, and for several weeks prior, the appellant was in the employ of the respondent in and around the mill, as his servant to watch

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the machinery thereof for a compensation to be paid therefor, and it was his duty to ascertain when said machinery was heating or required oil, and to oil it when necessary; that on said 12th day of March, 1883, and for a long time prior thereto, the machinery was out of repair, and in an unsafe and dangerous condition, and the wheels upon many of the shafts belonging to the machinery were fastened there by keys, which was an unnecessary, dangerous, and unsafe way of fastening them, and that said keys projected out from the ends of said shafts in an unnecessary and dangerous manner; that the respondent had notice of these matters, but had negligently, and with gross and wanton disregard of the safety of his employees generally, and of the appellant in particular, continued to operate said mill, and to permit said machinery to remain in such unsafe and dangerous condition; that on said date, and in consequence of said respondent's neglect in the premises, one of said keys caught appellant's hand while he was prudently and carefully performing his duties as such servant, and without fault upon his part, threw it between the wheels of said machinery, whereby it was injured to such an extent that he was obliged to have two of the fingers amputated, and for which he claimed general and special damages amounting to \$10,000. The respondent, in his answer to the complaint, denied all the material allegations thereof, and alleged affirmatively that the injury was received in consequence of the appellant's own carelessness in the premises.

The issue between the parties involved mainly the questions, whether the respondent was guilty of negligence and carelessness in consequence of the condition of the mill at the time the affair occurred, and if so, was the appellant careless and negligent concerning the matter, and did his carelessness and negligence contribute to the injury? The evidence seems to have been conflicting as to whether the mill was in an unsafe and dangerous condition as alleged in the complaint, and as to whether the appellant was "prudently and carefully performing his duties as such servant" at the time he received the injury. The mill seems to have been in the same condition at the time the accident

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happened that it was when the appellant commenced his term of service on the 1st of January preceding, though there was evidence tending to show that the respondent's superintendent had promised, upon appellant's complaining to him, to have it repaired as soon as he completed a contract they were then working upon, but did not. He subsequently, when appellant again complained to him, made another promise to remedy the defect.

The jury returned a verdict in favor of the respondent, upon which the judgment appealed from was entered. The grounds of error specified in the notice of appeal upon which the appellant relies in this court are the following: That the court erred in sustaining the respondent's objection to questions asked upon cross-examination by appellant's counsel to one T. C. Miller, a witness for the respondent, as follows: "Who, if anyone, served the subpoena upon you? State whether or not your fees were tendered you at the time the subpoena was served upon you. State what distance you came to attend as a witness in this case." And in the court's saying in connection therewith, in the presence of the jury, "that the jury would not be justified in drawing any inference therefrom, even if the witness were shown to have attended without any subpoena being served upon him at all." Also in limiting the counsel for the appellant to an hour and a half in which to sum up the case to the jury, and in the court's giving certain instructions to the jury which will hereafter be noticed.

The case has been very thoroughly and ably presented upon both sides. The counsel for the appellant by his brief and argument has shown that he has investigated every phase of it with the closest scrutiny. Yet, after a full consideration of every question, I am inclined to the opinion that his points are not well taken. The real issue between the parties was one of fact, and the court ought not to disturb the finding of the jury unless it is clearly shown that error was committed at the trial.

The first ground of error cannot possibly be maintained, whether the witness, T. C. Miller, was subpoenaed by the party or by an officer, or was not formally subpoenaed at all, was of

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no importance, nor whether any fees were tendered to him, nor the distance he came to attend as a witness. If he had come voluntarily in order to be a witness in the case, it might have shown a feeling of friendship for the party who called him; but that question was not asked him, and those that were asked him were entirely too remote to elicit any material fact. Suppose he had answered the question by saying "that no subpoena had been served upon him"; "that the respondent had requested him to attend, and that he consented to do so"; "that he had waived the formal service of subpoena." What possible discredit could it have cast upon his testimony? And the same inquiry may be made if he had answered that no fees were tendered him. I think the court concluded rightly "that the jury would not be justified in drawing any inference therefrom, even if the witness were shown to have attended without any subpoena being served upon him at all," and it might have added "without having required the prepayment of his fees."

The second ground of error, the limiting of the appellant's counsel to one hour and thirty minutes in which to argue the case to the jury, I believed to be more serious, as I had always entertained the view that the statute gave two hours on a side in such cases. It reads as follows: "Not more than two counsel on a side shall be allowed to address the jury on behalf of the plaintiff or defendant; and the whole time occupied on either side shall not exceed two hours unless the court, for special reasons, shall otherwise permit." (§ 194, subd. 4, Civ. Code.) But a careful observance of the language will show, I think, that the legislature did not intend to grant any definite time in which counsel might address the jury. It merely provided that the whole time occupied for that purpose should not exceed two hours on a side; and left in the court the power to permit, for special reasons, a longer time. The provision was a restriction upon the power of the court; it cannot permit any more time to be occupied than that, unless for special reasons. Courts at common law had the right to limit the time counsel should occupy in addressing the jury, and the statute confers the same right. It is included in the authority, "to control in

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furtherance of justice, the conduct of its ministerial officers and all other persons in any manner connected with a judicial proceeding before it, in every matter appertaining thereto." (§ 848, subd. 5, Civ. Code.) The legislature, by the former section, limits the said time to two hours on a side, leaving in the court the right to extend it for good reasons; but it has not restricted the power of the court from limiting it still more. It has not interfered with the power of the court, except as before stated. The latter may allow counsel to occupy two hours on a side for the purpose mentioned, but it has no authority to permit them to occupy a longer time unless there are good reasons for so doing. Its power so far is restricted, but in no other particular. A trial might, and often does, take such a course that only a single question of fact is left for the consideration of the jury, and that may involve the credibility of but one witness; in such case it would require a great amount of patience upon the part of a *nisi prius* judge to be compelled to sit four hours and listen to the harangue of a garrulous counsel.

It was contended by the appellant's counsel that, irrespective of the statute, the Circuit Court, in view of the importance of the case, extent of the testimony, its contradictory character, and of the intricate points of law involved in it, abused its discretion in limiting the time as it did herein. However that may have been, as a matter of fact, it does not appear with sufficient certainty to justify our interference with the judgment. Though I would be much more satisfied with the proceeding, if the court had allowed counsel two hours upon a side, yet I must concede that the presiding judge had the better opportunity to determine that matter.

The third assignment of error involves the correctness of the fifth and eighth instructions given by the Circuit Court to the jury. The following is a copy of the said instructions respectively: "Fifth. If you believe from the evidence that the plaintiff knew the position, condition, and character of the machinery by which he was injured, and could have reasonably avoided danger by approaching the same from the outward revolutions of the gear, and did not do so because he did not

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think to look, then he was guilty of negligence precluding his recovery, and your verdict must be for the defendant."

"Eighth. It was the duty of plaintiff when approaching machinery about which he was employed, both to think and look in order to avoid injury from such machinery, and if you find from the evidence that the injury sustained by the plaintiff was received by reason of his failure to think or look as to what he was doing, he was guilty of such negligence as precludes his recovery, and your verdict should be for the defendant."

The complaint against these instructions is, that they were given without qualification; that the circumstances under which the appellant was situated at the time he approached the machinery to ascertain whether any of the shafts were heating, his inexperience, the machinery having been previously heating, the smell of burning oil, and the necessity of haste, were disregarded; that the evidence showed an emergency had arisen, and the court did not allow the jury to consider it; that it, in effect, took these circumstances from the jury. But it must be remembered that the evidence upon that point was conflicting; that there was evidence upon the side of the respondent which tended to show that the machinery in all respects was in good condition, and ordinarily safe; that the key did not project, and that it would not be dangerous if it did; that it was customary to permit such keys to project; that the general condition of the machinery was good; that the appellant should have approached the particular gearing from the other side, and that there was nothing to prevent him from so doing; that the appellant had made different statements in relation to the shaft after he got hurt, and, at some five or six different times, had told different persons that the accident was caused by his own carelessness, and that it would not have occurred if he had not been in such a hurry to get away, so as to have a few hours to himself, and his being in a hurry and thinking about something else at the time. It was doubtless in view of all the testimony that said instructions were given. The court did not assume, and it had no right to assume, the correctness of the testimony on either side. If that adduced by the appellant had been conceded to be true, there would, from

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the appellant's standpoint, have been more ground for complaint.

It cannot be maintained that the instructions were erroneous as abstract propositions. The fifth one is to the effect, that if the appellant knew the position, condition, and character of the machinery by which he was injured, and could have reasonably avoided danger by approaching the same from the outward revolutions of the gear, and did not do so because he did not think or look, he was guilty of such a degree of negligence as to preclude his recovery. I think that is clearly maintainable as a correct proposition of law. The eighth one is to the effect that it was the duty of the appellant, when approaching machinery about which he was employed, both "to think and look" in order to avoid injury from such machinery, and if he received the injury by reason of his failure to "think or look" as to what he was doing, he was guilty of such negligence as precluded his recovery. That is also as it appears to me, a correct proposition of law, nor do I understand that the appellant's counsel controverts either of these conclusions; but he contends that under the peculiar circumstances of this case they are incorrect, because, he says, the evidence shows that the state of affairs before mentioned existed. He cannot, however, maintain that. The evidence adduced by the appellant may, and doubtless did, tend to show it, but the evidence of the respondent showed quite to the contrary.

It may be claimed that the court, admitting the correctness of the counsel's position, should have charged, that if the facts were as the appellant claimed, that the appellant did not "think or look" in consequence of the exigency of the case and the flurried condition of mind he was in, occasioned thereby, his failure to "think and look" would not be such negligence as would necessarily preclude his recovery, or, in other words, that the jury should take such facts and circumstances into consideration in determining whether the appellant was guilty of negligence or not. But the court was not asked to charge that, nor was the charge it gave necessarily inconsistent therewith, and the instructions referred to were not in and of themselves erro-

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neous. If, therefore, the appellant's counsel is correct in his position regarding the law, in such a case it does not follow that the court committed error as alleged. This view of the case did not probably occur to the mind of the court. In the hurry and confusion attending a jury trial, the presiding judge cannot be expected to instruct in regard to every view in which the facts of a case may be considered, without having his attention directed to it. His neglect in that particular should not therefore be held to be error, where his attention was not directly called to the matter by an appropriate prayer for instructions. It is unnecessary to speculate upon the consequences that would have followed if such an instruction upon the point under consideration had been asked and refused. I am inclined to believe, however, that if the facts were as the appellant claimed, in regard to the condition of the mill and machinery, and that the other circumstances existed when the injury was received, the question of appellant's negligence should have been submitted to the jury, and been determined in view of those facts and circumstances. Whether a person in a certain affair has acted carelessly and imprudently or not, depends very much upon the condition in which he is placed. The same prudence and deliberation would not be expected from him in case a house was on fire as would be in ordinary occurrences. But the view we have taken of this matter renders it unnecessary to express any opinion upon that point. It is sufficient to determine that the two instructions considered were not erroneous as given, whatever might have been the case if prefaced as before suggested.

This court, in *Stone v. Oregon City Manuf. Co.* 4 Oreg. 52, held that the refusal of an instruction, similar in terms to the said two instructions, was error, and reversed the judgment. The court there said "that there is very little machinery in a woolen mill but what is dangerous to careless and thoughtless operatives; consequently, we hold that it was the duty of respondent, while engaged in working in the vicinity of such machinery, to exercise his thinking faculties, and give careful attention to the business in which he was engaged. If he failed

to do so, and was injured in consequence thereof, it was such negligence as contributed to his own injury, and would prevent his recovery in the action." This I believe to be the general rule in such cases, and it is decisive of the present question. If the facts and circumstances surrounding the affair in which the party received the injury were such as to excuse him from that degree of care and thoughtfulness a prudent man would ordinarily exercise, they should, I think, be taken into consideration by the jury in determining the question of the party's negligence; but where, as in this case, such facts and circumstances are controverted, and the court fail to call the attention of the jury to them, the counsel for the party should so frame the instruction desired as to secure their benefit in case they are found to exist. The true test as to whether the party is chargeable with negligence in such a case is, whether the act is such that a man of ordinary prudence would not have done it under all the circumstances.

The fourth and last ground of error this court is required to consider is the correctness of the seventh instruction given to the jury. The following is a copy of the said instruction:—

"7. It is a general principle that a person cannot recover for an injury occasioned by the negligence of another, unless he himself is without negligence contributing to the injury of which he complains. If, therefore, you find from the evidence that the negligence, carelessness, or want of care, on the part of plaintiff, contributed to the injury of which he complains, he cannot recover in this action, and your verdict must be for the defendant."

The appellant's counsel contends that the instruction is incorrect, in not specifying the degree of negligence that must contribute to the injury, to prevent a recovery; that there are three degrees of negligence—slight, ordinary, and gross; and that a party may contribute slight negligence to the injury, and still recover on account of the negligence of the adverse party.

The instruction was evidently intended only to lay down the ordinary rule upon the subject, and the language employed is the same that is commonly used in stating the general principle which governs in such cases. The jury could not possibly have

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been misled in consequence of any omission in the particular mentioned, even if it were necessary to make the distinction, as the next following instruction fully explained the degree of negligence required to be shown in order to defeat a recovery in the action. By the eighth instruction the jury were told as follows: "If you find from the evidence that the injury in question was caused by some negligence upon the part of the defendant, amounting to want of ordinary care, and that the plaintiff himself exercised ordinary care in the matter, then it would be no defense that the plaintiff might have avoided the injury by the utmost possible care. Extraordinary care on the part of the plaintiff is not required, and its absence would not excuse the defendant."

This fully served to explain the previous instruction in the respect mentioned, and it is idle to contend that the jury could have been misled upon the point. Besides, I do not concede that a party can recover in such a case when chargeable with any degree of negligence upon his part if it directly contributes to the injury. A person may be negligent in an affair and still recover on account of the negligence of another party, but not when his negligence is the proximate cause of the injury. The law does not enforce contribution between joint tort feorsors. However slight the negligence upon the part of a plaintiff may be, if it be such that but for that negligence the misfortune could not have happened he cannot recover; but if the injury would have happened if his want of care had not contributed thereto, there may be a liability.

I am inclined to the belief that said instruction is correct, without any explanation. Affirmed.

WALDO, C. J., did not sit in this case.

RULES

OF

THE SUPREME COURT.

[ADOPTED NOVEMBER 4, 1885.]

RULE 1. The second day of the October term shall be set apart as the time when persons desiring admission to practice as attorneys in the courts of this State may appear and present their applications; who, having been examined in open court touching their qualifications for admission, and found duly qualified, may be admitted to practice as attorneys and counsellors in the several courts of this State. Application for such admission can only be made in this court.

RULE 2. Applicants for admission as attorneys shall be examined by the justices of the Supreme Court, or under their direction, and only such shall be admitted as shall appear duly learned in the common law, the law merchant, the principles of equity jurisprudence, the history and the constitutional law of England prior to the Declaration of Independence, the history and constitutional law of the United States, the statute and constitutional law of this State, and the practical administration of the law.

RULE 3. Each applicant for admission to practice must produce the certificate of some attorney of good standing in this court; that such applicant, if a graduate of some literary institution, has read law at least two years; or, if not such graduate, at least three years, and has the requisite learning and ability. There shall also be presented the certificate of two attorneys of like standing, to the effect that the applicant is a man of good,

moral character. In case, however, the applicant produce a diploma from any regular law school showing that he has graduated at such school, then the certificate of his having read the time above specified shall be dispensed with. Such applicant shall also file his own affidavit that he is a citizen of the United States and of this State, and has read the books, a list of which shall be included in his affidavit.

RULE 4. Attorneys and counsellors at law and solicitors in chancery that have been admitted to the bar of the Supreme Court, or court of last resort of any other State, Territory, or District of the United States governed by the common law, or of England, her colonies or dependencies, where the common law prevails, and that are otherwise qualified, may be admitted to the bar of this court on motion founded upon proper certificates of admission to such courts, accompanied by a certificate signed by the judge of some court of general jurisdiction in the county or political division in which the applicant last resided, prior to his application, that he is of good, moral character and standing at the bar, and has practiced law at least one year.

RULE 5. Every transcript on appeal to this court shall be on legal cap paper, and written on one side only; shall be chronologically arranged, and prefaced with an index specifying the page of each separate paper, order, or proceeding. Manuscripts and testimony must be paged by numbering the leaves consecutively to the end, on the bottom of the leaf near the left hand corner. Transcripts must have the name of each paper written on the margin thereof, and each page of the testimony must have written on the left hand margin near the bottom the name of the witness. The testimony must be preceded by an index, in which shall be noted the first page of the testimony of each witness. No case shall be docketed which fails to conform to the foregoing requirements. In case a motion to expunge a paper or papers from any transcript filed with the clerk of this court be granted, upon the grounds that such paper or papers are not properly a part of such transcript, the clerk of this court shall thereupon, or at any time when this court shall especially order it, separate such paper or papers from the transcript, ascertain the cost of copying the same at the legal rate of charges therefor, and deduct the amount thereof from the expenses of the transcript

charged in any bill of disbursements filed with him for taxation. The clerk shall also be entitled to a fee of two dollars for separating such papers from the transcript, which sum shall be allowed as costs against the party filing the same. When the paper so ordered expunged is so connected that it cannot be expunged without mutilating the remaining part of the transcript, the court may require the party in fault at his own expense to file a new transcript, omitting the objectionable papers.

RULE 6. The transcript shall be filed with the clerk of this court on or before the second day of the term next after perfecting the appeal.

RULE 7. When the appeal is perfected and the transcript is not filed as required by Rule 6, the same shall be deemed abandoned, and the respondent may, on motion, have the judgment or decree of the court below affirmed, by filing copies of the notice of appeal and proof of service thereof, the undertaking, and the judgment entry.

RULE 8. The causes from each judicial district shall be docketed together, and the districts shall be placed upon the docket in the following order: (1) Fourth district; (2) first district; (3) second district; (4) third district; (5) fifth district; (6) sixth district. Civil cases shall be heard in the order in which they are docketed unless otherwise ordered, but criminal cases may be heard at any time during the term fixed by the court.

RULE 9. Motions to dismiss appeals, to perfect transcripts, or to affirm the judgment in cases where the appeal has been abandoned, shall be filed at least ten days before the case is called for hearing, and notice thereof be given as prescribed in titles 2 and 3 of chapter 6 of the Civil Code; *provided*, that in all cases which come on for hearing before the end of the second week of the term, it shall be sufficient to file such notice on the third day of the term, when such motions shall be taken up on the first motion day thereafter. Notice of motions to extend the time for filing transcripts shall be served at least three days before the first day of the term.

RULE 10. The second Monday of the term, and each Monday thereafter, shall be motion day, at which time, unless otherwise specially ordered, all motions which have been duly served shall be disposed of.

RULE 11. All applications for rehearing shall be by petition in writing, setting forth the grounds thereof, presented and filed within ten days after the judgment, order, or decision is announced, and within the term. No argument will be heard thereon.

RULE 12. Unless upon good cause otherwise ordered, the appellant, at least five days before the argument, shall furnish to the respondent a printed copy of his brief, and within three days thereafter the respondent shall furnish to the appellant a like copy of his brief. At least two days before the calling of the cause for argument, each party shall furnish to the justices and to the reporter each two copies of his brief, and to the clerk one copy, to be filed with the record of the cause. In suits in equity, the briefs shall contain such portions of the evidence as may be deemed material, giving the names of witnesses, and the number of the question and answer. A failure to furnish briefs as aforesaid shall be deemed a waiver of the right of the party in fault to argue the cause.

RULE 13. The page of the printed brief must be eight and one half inches in length, and five and one half inches in width, and the outer blank margin of each page must be one and one fourth inches in width.

RULE 14. The mode of revision of final decisions of the Circuit Courts, where the course of proceeding is not specifically pointed out by the Civil Code, shall be by appeal, as in cases of appeal from judgments at law; and questions of fact shall not be considered upon such appeal, unless made a record in the form of a bill of exceptions.

RULE 15. No records or papers on file in the office of the clerk shall be taken therefrom except by order of the court or one of the justices; *provided*, that in cases pending and not yet submitted, the transcript or evidence may be withdrawn temporarily on filing a stipulation to that effect, signed by the attorneys of record in the case, and giving a receipt therefor.

Ordered, that the foregoing rules shall be in force from and after the first day of the March term, 1886, of this court, except Rule 4, which shall take effect immediately, and that thereupon all existing rules of this court be rescinded.

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the due acknowledgment of said mortgage by the husband, entitled it to record without regard to the mode of execution by the wife. (2) That said deed was not entitled to record for want of the certificate aforesaid. (3) That where neither of two conveyances is recorded within five days from the time of execution as provided in section 26, *Misc. Laws*, the one thereafter first recorded will take precedence. (4) That under the recording acts of this State, a mortgage stands upon the same footing as an absolute conveyance. — *Flechner v. Sumpter*, 161.

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6. **NEW TRIAL—DISCRETION—APPEAL.**—A motion for a new trial upon the ground of the insufficiency of the evidence to justify the verdict is addressed to the sound discretion of the court in which it is made, and cannot be reviewed on appeal. — *State v. Mackey*, 154.

7. **APPEALS—ERROR—WHEN MATERIAL.**—When it does not appear that errors committed at the trial have prejudiced the accused, this court will not ordinarily reverse the case. But where the error consists in the infraction of a constitutional guaranty in favor of personal liberty, the law will presume an injury, and adjudge accordingly. — *State v. Lurch*, 99.
8. **MOTION FOR NEW TRIAL—APPEAL FROM—MISCONDUCT OF JUROR.**—The ruling of the trial court on a motion for a new trial, on the grounds that a juror had drank intoxicating liquors during the trial, and that the evidence was insufficient to justify the verdict, cannot be reviewed on appeal. — *State v. Becker*, 318.
9. **PRACTICE—NONSUIT—WAIVER OF ERROR.**—Where a plaintiff has not proved a cause sufficient to be submitted to a jury, yet the defendant after a motion for a nonsuit was made and overruled went into his defense, and supplied the plaintiff's defective evidence, the appellate court will not review the ruling on the motion. — *Bennett v. Northern Express Co.*, 49.
10. **APPEAL—DAMAGES.**—Where an injury resulting from an error consisting of the allowance of an item of damages, can be segregated from the amount of the verdict, and plaintiff will remit such sum, the judgment will on appeal be affirmed for the balance; otherwise a new trial will be ordered. — *Mackey v. Olssen*, 429.
11. **APPEAL FROM DECREE—WHAT CONSIDERED ON.**—The provisions of sections 527 and 534 of the Civil Code seem to restrict the power of this court upon an appeal from a part only of a decree to that part thereof specified in the notice. — *Shook v. Colahan*, 239.

ASSAULT AND BATTERY.

ASSAULT AND BATTERY—JUSTIFICATION—PLEADING.—In an action for assault and battery, justification, to be available as a defense, must be specially pleaded. — *Konigsberger v. Harvey*, 286.

ASSIGNMENTS.

1. **FERRY LICENSE—ASSIGNABILITY.**—Whether a ferry license is assignable without the consent of the granting power, *quære*. — *Hackett v. Multnomah Railway Co.*, 124; *Hackett v. Wilson*, 25.
2. **ASSIGNMENT OF LICENSE—CANNOT BE QUESTIONED COLLATERALLY.**—Whether a ferry license is assignable or not, *quære*; but if it is a personal trust, not assignable without the consent of the granting power, the right to object to its transfer, or its exercise by a party other than the original licensee, is a right affecting the public, to be taken advantage of by its officers, and cannot be collaterally questioned. — *Hackett v. Wilson*, 25.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

1. **ASSIGNMENT FOR BENEFIT OF CREDITORS—WHEN SET ASIDE—EQUITY.**—A general assignment for the benefit of creditors when made in fraud of the insolvent law may be set aside in equity; but in such case the creditor must first obtain a judgment upon his claim, or in some manner secure a lien upon the debtor's property. — *Dawson v. Coffee*, 513.
2. **ID.—ATTACHMENT—GARNISHMENT.**—When a debtor attempts to dispose of his property to defraud his creditors, the latter may attach it by taking it from the

debtor or by garnishment if in the hands of a third party, and this even in case of a general assignment for the benefit of creditors if it be fraudulent. — *Id.*

3. **ID. — EQUITY — CREDITOR'S BILL — WHEN MAY BE BROUGHT.** — In such case the creditors may recover a judgment at law, and after exhausting the ordinary legal remedies to enforce payment, may commence a creditor's bill to obtain satisfaction of their claims. — *Id.*
4. **ASSIGNMENT — CLAIM OF CREDITOR — EQUITY JURISDICTION.** — Where an insolvent has made an assignment for the benefit of all his creditors under the insolvent law of the State, and the claim of a creditor has been presented to the assignee, and allowed under the provision of the act, these facts would entitle the creditor to resort to equity to prevent a fraudulent division and misapplication of the fund. — *Id.*

ASSUMPSIT.

CONSIDERATION. — An action can be maintained by A upon a promise by B, on a consideration moving from C to pay A a sum of money, even though not informed thereof until afterwards. — *Schneider v. White*, 508.

ATTACHMENT.

1. **ASSIGNMENTS FOR BENEFIT OF CREDITORS — ATTACHMENT — GARNISHMENT.** — When a debtor attempts to dispose of his property to defraud his creditors, the latter may attach it by taking it from the debtor or by garnishment if in the hands of a third party, and this even in case of a general assignment for the benefit of creditors if it be fraudulent. — *Dawson v. Coffee*, 513.
2. **GARNISHMENT — NOTICE OF.** — The delivery to a garnishee of a copy of the writ of attachment, together with a notice to the effect that the officer thereby "attached all debts, property, money, rights, dues, and credits of every nature in his hands or under his contract," is a valid garnishment, and sufficiently specifies the property attached. — *Carter, Rice & Co. v. Koshland*, 492.
3. **GARNISHEE — PROCESS — SERVICE — VOLUNTARY APPEARANCE.** — In garnishment proceedings the order provided for in sections 150 and 160 of the Code of Civil Procedure is process, and must be served on the garnishee personally. Service upon his attorney is insufficient. But when it appears that such garnishee voluntarily appeared in person and by attorney at the hearing upon such order, such appearance is equivalent to personal service. — *Id.*
4. **JUDGMENT AGAINST — ORDER OF SALE OF ATTACHED PROPERTY.** — The Act of October 25, 1878, authorizing an order of sale of property attached supersedes the previous provisions authorizing the entry of judgment against a garnishee, and is a complete substitute therefor. — *Id.*
5. **ATTACHMENT.** — An attaching creditor is to be deemed a purchaser in good faith and for a valuable consideration from the date of the attachment. — *Gill & Co. v. Frank*, 507.

ATTORNEYS AT LAW

1. **ATTORNEYS — ADMISSION OF WOMEN TO PRACTICE.** — Under existing laws, courts of this State have no power to license women to practice law. — *In re Leonard*, 93.
2. **APPEARANCE — NOTICE OF.** — The formal notice of appearance in a judicial proceeding prescribed in section 520 is unnecessary, unless the right of the attorney to appear is challenged by the adverse party. — *Carter, Rice & Co. v. Koshland*, 492.

BAILMENTS.

1. **WAREHOUSEMAN — WAREHOUSE RECEIPT — ASSIGNMENT — EFFECT OF.** — When by a warehouse receipt it is agreed to deliver the property to anyone to whom the receipt may be indorsed as to one or *his order*, a symbolical delivery of the property may be effected by transfer of the receipt, and the warehouseman in such case becomes bailee to such transferee. — *Gill & Co. v. Frank*, 507.
2. **ID.** — But when a warehouseman by his receipt restricts his undertaking to delivery of the property to his bailor personally, a change in the possession of such property, so that his custody would become the possession of a stranger, cannot be effected without his consent. (*Solomon v. Bushnell*, 11 Oreg. 227, distinguished.) — *Id.*

BATTERY.

See ASSAULT AND BATTERY.

BONDS.

See UNDERTAKINGS.

CARRIERS.

1. **FREIGHT RECEIPT — CONDITION — WAIVER.** — A condition in an express receipt that the company shall in no case be liable for loss or damage, unless the claim thereof shall be presented in writing within ninety days after date of receipt, is waived by the company in not exacting a compliance therewith. — *Bennett v. Northern Pacific Express Co.*, 49.
2. **ID. — CARRIER AND CONSIGNEE — DELIVERY TO CONSIGNEE.** — An express company cannot be at the same time both consignee and carrier. Nor is such a company relieved of its liability as a carrier until it has made a personal delivery or tender of the article conveyed to the consignee, if he can be found. — *Id.*
3. **ID. — DELIVERY TO AGENT OF CARRIER.** — Where goods are consigned to an owner in care of an agent of the carrier, it seems that delivery to the agent will exonerate the carrier. But such rule stands upon the ground of a tacit understanding between the parties. — *Id.*
4. **EXPRESS COMPANY — MODIFICATION OF CONTRACT A QUESTION FOR THE JURY.** — A package of money was delivered to the Northern Pacific Express Co. for transportation, addressed to the "Northern Pacific Express Company, Ainsworth, W. T." Subsequently the address was changed by inserting the word "agent" before the word "northern." The money was lost, and in an action therefor, *held*, that whether such change resulted from a modification of the contract of carriage was a question for the jury. — *Id.*
5. **ID. — PROOF OF AGENCY.** — It is not error in such a case to permit the agent who received the money to testify as to what capacity and for whom he was acting in the receipt of the money in question. — *Id.*

COLOR OF TITLE.

STATUTE OF LIMITATIONS — COLOR OF TITLE — TAX DEED. — Where a defendant claims title by virtue of the Statute of Limitations, and offers in evidence a tax deed to himself, such deed in connection with possession is competent, even if its description of the premises is imperfect, to show that the defendant was holding under color of title. — *Smith v. Shattuck*, 362.

CONSTITUTIONAL LAW.

1. **CONSTITUTIONAL LAW.**—When a statute has been long recognized as binding, and important affairs of the community have been transacted in accordance with its provisions, it should not be disturbed unless it unequivocally conflicts with the organic law.—*Crawford v. Beard*, 447.
2. **GRAND JURY—CONSTITUTIONAL LAW—CONSTRUCTION OF STATUTE.**—The Constitution, article 7, section 18, having provided that the grand jury shall be chosen from the jurors in attendance at the court, an act which provides that the clerk shall draw from the body of jurors a grand jury several days prior to the term of court is in conflict therewith and void, and an indictment by a grand jury so drawn is invalid.—*State v. Lawrence*, 297.

See STATUTES.

CONTRACTS.

1. **CONTRACT—MORTGAGE.**—Contract construed, and held to constitute a mortgage.—*Manaudas v. Heilner*, 335.
2. **MARRIED WOMEN—POWER TO CONTRACT—FAMILY EXPENSE.**—The effect of the act regulating the rights and liabilities of married women (approved October 21, 1878) was to enable her to contract and incur liabilities, and such contracts and liabilities may be enforced the same as if she were unmarried. For family expenses she may be sued jointly with her husband, or separately, and a personal judgment rendered against her.—*Phelps v. Kelly*, 213.

CONVERSION.

1. **CONVERSION—WHAT IS.**—Any interference subversive of the right of the owner of personal property to enjoy and control it is a conversion.—*Budd v. Mulnomah Railway Company*, 271.
2. **CONVERSION OF MONEY.**—When one person obtains possession of money which *ex æquo et bono* belongs to another, the latter may maintain an action to recover it.—*Peterson v. Foss*, 81.
3. **TROVER—CONVERSION OF SHARES OF STOCK.**—Trover will lie for the conversion of shares of the capital stock of a corporation.—*Budd v. Mulnomah Railway Co.*, 271.

CONVEYANCES.

See DEEDS.

CORPORATIONS.

1. **CORPORATE SEAL—PROMISSORY NOTE.**—But where a promissory note is signed "A B, Pres't," and "C D, Sec. G. M. Co.," and on its face is plainly stamped an impression of a seal bearing the words "Granger Market Co.," it must be assumed that the seal was put there to serve some purpose. Such an instrument indicates an intention to bind the company and not the individuals.—*Guthrie v. Imbrie*, 182.
2. **ID.—EFFECT OF CORPORATE SEAL.**—(Per WALDO, C. J., dissenting).—The sole purpose of a corporate seal is to give full faith and credit to the writing to

which it is appended. Where a promissory note is signed by the president and secretary of a corporation as such, without other words indicating that the note is the act of the corporation, affixing the seal cannot be construed into a declaration that they signed on behalf of the company. — *Id.*

3. CORPORATIONS — CREDITORS OF — LIABILITY OF STOCKHOLDER — EQUITY — PARTIES. — In a suit by a creditor to enforce the individual liability of a stockholder for a debt of the corporation, it is not necessary that all the creditors of the corporation be joined, nor that all the stockholders be made defendants. — *Brundage v. Monumental Gold & Silver Mining Company*, 322.
4. *Id.* — In a suit to enforce the individual liability of a stockholder, if a defendant stockholder desires other stockholders to be made parties, he must bring them in at his own expense by an answer or other proper proceeding. — *Id.*
5. *Id.* — When the object of the suit is to wind up the affairs of an insolvent corporation, and it becomes necessary to ascertain the whole amount of the indebtedness, and to whom due, and who are liable to contribute upon unpaid stock subscriptions, such suit should be in the name and for the benefit of all the creditors, and against all the stockholders found within the jurisdiction. — *Id.*
6. LIFE INSURANCE — FOREIGN CORPORATION — CONSTRUCTION OF STATUTE — DOING BUSINESS. — Taking an application for life insurance by an agent in Washington Territory, and forwarding to the insurance company in Kansas, which alone had authority to accept or reject the application, and where it was accepted, and a policy issued thereon, is not "doing insurance business" in said Territory, within the meaning of the statute thereof; but subsequently taking a note for an installment of the premium on such policy when it became due, and transmitting it to the company in like manner, is doing business within the meaning of such statute. — *Hacheny v. Leary*, 40.
7. COTENANCY IN A FRANCHISE — ACCOUNTING. — A corporation may be a joint owner of a ferry where not inconsistent with its constitution, and as such, entitled to share in its earnings, and to that end may have an accounting. — *Hackett v. Multnomah Railway Co.*, 124.
8. CORPORATION — PARTNERSHIP — AGENCY. — The principle which prevents a corporation from being a partner with another corporation, or a natural person, is that in a partnership the act of one partner binds the firm, while a corporation can only be bound by the acts of its officers. — *Id.*
9. TROVER — CONVERSION OF SHARES OF STOCK. — Trover will lie for the conversion of shares of the capital stock of a corporation. — *Budd v. Multnomah Railway Co.*, 271.

COTENANCY.

CORPORATIONS — COTENANCY IN A FRANCHISE — ACCOUNTING. — A corporation may be a joint owner of a ferry where not inconsistent with its constitution, and as such, entitled to share in its earnings, and to that end may have an accounting. — *Hackett v. Multnomah Railway Co.*, 124.

COUNTER-CLAIM.

COUNTER-CLAIM. — A counter-claim to a suit must be one upon which a suit might be maintained by the defendant against the plaintiff. An unliquidated demand triable before a jury, and bearing no relation to the subject of the suit, cannot be used as a set-off to a suit in equity. — *Burrage v. Bonanza Gold & Quicksilver Mining Company*, 169.

COUNTIES.

ACTION AGAINST COUNTY.—An action cannot be maintained against a county upon a claim for services where the compensation is not fixed by law. Where a county deals with a party in its corporate capacity, it may be sued the same as a natural person, but where the sovereign power of the State is exercised through a county organization, a claim for compensation arising from discharge of a duty in such a case must be adjusted in the mode pointed out by law. — *Pruden v. Grant County*, 308.

COUNTY COURTS.

COUNTY COURTS—AUDITING ACCOUNT—WRIT OF REVIEW.—The county court, in auditing an account for services, where the amount of compensation is not fixed by law, is doing "county business"; its acts are judicial, and its award must be regarded as just compensation. In such case its decision may be reviewed by writ of review. — *Pruden v. Grant County*, 308.

COURTS.

1. **STARE DECISIS.**—The decision of this court in *Sellers v. City of Corvallis*, 5 Oreg. 278, criticised, but followed upon the principle of *stare decisis*. — *City of Corvallis v. Stock*, 891.
2. **NUXO PRO TUNC ORDER.**—*Semble*, that at any time when the rights of third parties have not intervened, a court may so amend its record as to make them conform to the truth. — *Carter, Rice & Co. v. Koshland*, 492.

See ATTORNEYS AT LAW.

COVENANTS.

1. **COVENANTS—BREACH OF PERFORMANCE.**—Covenants are dependent and concurrent when the act of each party is to be done at the same time. In such case the party alleging a breach must aver a tender of performance on his part at the stipulated time. — *Powell v. Dayton, Sheridan & Grande Ronde R. R. Co.* 488.
2. **SPECIFIC PERFORMANCE—COVENANT AGAINST ENCUMBRANCES.**—Where in a contract for the sale of real estate the vendor agrees to covenant against encumbrances, specific performance will not be decreed in his favor until all encumbrances on the property shall have been removed, or at least reduced to the amount of the balance of the purchase price. — *Sanford v. Wheelan*, 301.
3. **CONSTRUCTION OF COVENANT.**—A covenant in a deed provided "that the said S. F. M. Co. shall be entitled to have the Santiam water which is introduced to Salem by said W. W. M. Co., except the water right heretofore granted to the State of Oregon by contract, divided into two equal parts, and that one half of the same shall flow and be conducted by the race now in use to the premises herein granted to the party of the second part, and the other half thereof shall flow down in the natural channel of Mill Creek, or through such other channel as may be provided; said division of said Santiam water shall be made at or near the dam on the land claim of A. F. Waller and wife, where the race running to the oil mill is taken out of Mill Creek. . . . And it is further covenanted by and between the parties hereto, their successors and assigns, that the said S. F. M. Co. shall pay one sixth of the expense, or do one sixth of the

labor, and furnish one sixth of the material necessary to maintain in full use and repair the head-race and gates on or near the Santiam River, now owned and used by W. W. M. Co. for introducing said Santiam water to Salem; also maintain the dam on said Waller's claim." . . . Held, that under said covenant, the dam on the Waller claim was to be maintained by the S. F. M. Co. at their own expense, and an injunction should not be granted against the construction of a dam at the point indicated by the S. F. M. Co., but a suit might be maintained to compel an equal division of the water.—*City of Salem Co v. Salem Flouring Mills Co.*, 374.

CREDITORS' BILLS.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.—EQUITY—CREDITOR'S BILL.—WHEN MAY BE BROUGHT.—When a debtor attempts to dispose of his property to defraud his creditors, the creditors may recover a judgment at law, and after exhausting the ordinary legal remedies to enforce payment, may commence a creditor's bill to obtain satisfaction of their claims.—*Dawson v. Coffee*, 315.

CRIMINAL CONVERSATION.

1. **CRIMINAL CONVERSATION—EVIDENCE OF THE MARRIAGE.**—In an action of criminal conversation the marriage may be proved by the testimony of eye-witnesses or the parties themselves. The certificate of the marriage is not essential.—*Jacobson v. Siddal*, 280.
2. **Id.—GIST OF ACTION—EFFECT ON RELATION OF PARTIES.**—The gist of an action of criminal conversation is not alone loss of service but of the society and comfort of the wife; the plaintiff had a right to show the terms upon which he and his wife lived together, and the practical consequences to their married life from the injury alleged.—*Id.*

CRIMINAL LAW.

1. **CRIMINAL LAW—UTTERING FORGED WRITING—ADMISSION—SIMULATED HANDWRITING.**—Upon the trial of an indictment for uttering a forged writing, to wit, a promissory note, evidence that the name signed to the note had the appearance of being a different handwriting from the body of the instrument is proper, notwithstanding the accused admits that he signed the name, claiming to have had authority to do so.—*State v. Luroh*, 99.
2. **CRIMINAL LAW—OBTAINING MONEY BY FALSE PRETENSES—EVIDENCE.**—Upon trial of an indictment for obtaining money by false pretenses, where the charge is that the accused had obtained money by giving certain forged instruments, purporting to be promissory notes of third parties, as security, representing them to be genuine, the accused may give evidence that the signatures upon the notes were written by himself, under the direction and authority of the persons represented to be the makers. A note so signed is not a false writing, but genuine.—*State v. Luroh*, 95.
3. **FORGERY—INTENT TO DEFRAUD SUFFICIENT—CONSTRUCTION OF STATUTE.**—To sustain a conviction upon a charge of forgery, under section 592 of the Criminal Code, the State must prove that the accused had made such a use of the forged instrument as might have resulted in injuring or defrauding some one. If the note has been "uttered or published as true and genuine" with intent to defraud, the offense is made out, though no defrauding be actually accomplished.—*State v. Luroh*, 99.

4. **ID. — EVIDENCE — SIMULATED HANDWRITING.** — Where the defendant admitted in his opening statement to the jury that he intentionally wrote the names alleged to have been forged as near like the parties would have written them as he could, evidence is nevertheless admissible to show that such names are in a different handwriting from the body of the instrument. — *State v. Lurch*, 104.
5. **CRIMINAL LAW — INDICTMENT — FORGERY.** — In an indictment for forgery it is not necessary to name any particular person in the indictment as having been defrauded. But the naming of such a person would have the effect to confine the proof of defrauding to the person named. — *Id.*
6. **CRIMINAL LAW — INDICTMENT — PLEA OF NOT GUILTY — CHARGE TO THE JURY.** — The plea of not guilty puts in issue every material allegation in an indictment. An instruction that "the State has fully established" the fact of the killing, and that "the only material allegation about which there is any dispute is that which charges these defendants with having purposely and of deliberate and premeditated malice caused the death of," etc., is error. The killing of deceased by the defendants must be found by the jury before the question of premeditation or malice could arise. — *State v. Mackey*, 154.
7. **CRIMINAL LAW — INDICTMENT — HIGHWAY.** — In an indictment for obstructing a highway, it is not necessary to set out the *termini*. It is sufficient to set out in a compendious way that it is a highway. *After* in pleading a private way. If the *termini* be stated, they must ordinarily be proved. But when a local description, sufficient to fix the precise point of obstruction, is given as well as the *termini*, the latter may be disregarded on proof of a highway at the place of obstruction. — *State v. Hume*, 188.
8. **GRAND JURY — INDICTMENT.** — An indictment found by a grand jury which was improperly drawn is invalid, and a conviction thereon must be reversed. — *State v. Lawrence*, 267.
9. **CONSTRUCTION OF STATUTE — EVIDENCE OF ACCUSED — CROSS-EXAMINATION OF.** — The statute of this State, which allows a person accused of a crime to be a witness in his own behalf (Laws 1880, p. 28), strictly confines the right to cross-examine him to the facts testified to in chief; and it was error to require the defendant on cross-examination to write his own name, or that of another person, when he had not testified in reference thereto in his direct examination. — *State v. Lurch*, 99.
10. **CRIMINAL LAW — EVIDENCE — PRESUMPTION — POSSESSION OF STOLEN PROPERTY.** — The only presumption of guilt arising from the possession of property recently stolen is one of fact and not of law. — *State v. Hale*, 352.

See INDICTMENTS.

DAMAGES.

1. **EXEMPLARY DAMAGES.** — Exemplary damages cannot be recovered of a corporation or other person for the wrongful acts of its servant, even when wilful and malicious, unless the employer directed the doing of the act, or ratified it when done, or unless it is chargeable with gross negligence in the employment or retention of such servant. — *Sullivan v. Oregon Railway & Navigation Company*, 392.
2. **EXEMPLARY DAMAGES — PLEADING.** — In order to recover exemplary damages it must appear from the complaint that the act occasioning the damage was done maliciously, or was the result of wilful misconduct of the defendant, or of that reckless indifference to the rights of others which is equivalent to an intentional violation of them. — *Id.*

3. **CONTRACT OF SALE—BREACH OF—MEASURE OF DAMAGES.**—In an action for breach of contract for the sale of "all the timber" on a certain tract of land "suitable for piling or railroad ties," and giving the purchaser a right of way to said timber, the measure of damages is the difference between the contract price and the market value of the timber standing at the time the cause of action arose, and it was error to allow evidence to show the cost of constructing a road to such timber. When the injury resulting from such error can, from the record, be segregated from the amount of the verdict, and plaintiff will remit such sum, the judgment will be affirmed for the balance; otherwise a new trial will be ordered. — *Mackey v. Olsen*, 429.
4. **SLANDER—ACTIONABLE WORDS—DAMAGES.**—When the court can see, without the aid of a jury, that the actionable words must prove injurious, they will be actionable *per se*; and the plaintiff in such cases will be entitled to at least nominal damages. — *Quigley v. McKee*, 22.
5. **APPEAL—DAMAGES.**—When an injury resulting from an error consisting of the allowance of an item of damages, can be segregated from the amount of the verdict, and plaintiff will remit such sum, the judgment will on appeal be affirmed for the balance; otherwise a new trial will be ordered. — *Mackey v. Olsen*, 429.
6. **BILL OF EXCHANGE—CONSIDERATION—FAILURE OF.**—Partial failure of consideration may be set up to an action on a bill of exchange, and the defendant may recoup his damages though they be unliquidated. — *Davis v. Watt*, 425.
7. **DAMAGES—CONTRIBUTORY NEGLIGENCE—INSTRUCTION TO JURY.**—In an action for damages to an employee by reason of alleged defects in the machinery of a mill, it is not error to charge that "if the plaintiff knew the position, condition, and character of the machinery by which he was injured, and could reasonably have avoided the danger by approaching the same from the outward revolutions of the gear, and did not do so because he did not think or look, he was guilty of negligence precluding recovery." It was the duty of plaintiff when approaching machinery about which he was employed to both think and look, in order to avoid injury from such machinery, and if you find from the evidence that the injury sustained by plaintiff was received by reason of his failure to think or look as to what he was doing, he was guilty of such negligence as precludes recovery. — *Hurst v. Burnside*, 520.

DEBTOR AND CREDITOR.

See ASSIGNMENTS FOR BENEFIT OF CREDITORS; FRAUDULENT CONVEYANCES;
INSOLVENCY.

DEDICATION.

1. **HIGHWAY—DEDICATION—USER.**—The owner of the soil may make a qualified dedication of a road or way across it; he may reserve the right to keep a gate across it, or to subject it to any use not inconsistent with the public use. *Semle*, mere user, however long continued, is not sufficient to give a right to the public. — *Smith v. Gardner*, 221.
2. **LD. — PERMISSIVE USE.**—Permissive use of a way by certain portions of the community constitutes a license and not a dedication. — *Id.*

DEEDS

1. CONVEYANCE — PROOF OF — CERTIFICATE — WHAT TO CONTAIN. — In making proof of an unacknowledged deed (under § 17, tit. 1, ch. 6, Misc. Laws) it is necessary not only that the witness should be sworn, but that that fact should be stated in the certificate. — *McIntyre v. Kamm*, 253.
2. DEED — DEFECTIVE ACKNOWLEDGMENT — EQUITABLE TITLE — COVENANT, EFFECT OF. — Where A, B, and C jointly occupying a tract of land, and claiming to be proprietors thereof, the title to which is in the United States, join in a deed, by which they release, confirm, and quit claim to one of their number, B, a designated part thereof, and such deed contains covenants to warrant and defend against all persons, except the United States, and for further assurance, but was not so attested as to entitle it to record, and afterward A obtained a patent for said tract, held, that B or his grantees thereby became the equitable owners of such land, against all persons having knowledge or notice of their rights. A, after obtaining the patent, conveyed and quit claimed to D "all his right, title, and interest" in said tract. Such deed passed only such an estate as the grantor had a legal right to convey by deed of bargain and sale, and D took subject to B's prior equities in the land. — *Baker v. Woodward*, 3.
3. CONVEYANCE UNRECORDED — JUDGMENT LIEN — PRIORITIES — NOTICE. — A conveyance of real property in this State is void as against the lien of a judgment, unless such conveyance be recorded at the time of docketing such judgment, or within the time after its execution provided by law as between conveyances for the same real property; but such lien would not prevail over a prior unrecorded conveyance, unless it also appeared that the lien was taken or acquired in good faith, without knowledge or notice of such prior unrecorded conveyance. — *Id.*
4. CONVEYANCE — ACKNOWLEDGMENT — REGISTRATION — PRIORITY. — On the 17th day of April, 1890, the defendant S. executed and duly acknowledged in this State, a mortgage to the plaintiff of the premises in controversy. On the 15th day of June following, in Idaho Territory, the wife of the grantor signed the same mortgage, and acknowledged it before a clerk of a District Court of said Territory, and at the same time and place the same parties executed a deed of said premises to the defendants H. and B., and acknowledged it before the same officer. Neither instrument was accompanied by a certificate from the proper officer that it was executed and acknowledged in accordance with the laws of said Territory. Both were filed for record at the same time. Held, (1) That the due acknowledgment of said mortgage by the husband, entitled it to record without regard to the mode of execution by the wife. (2) That said deed was not entitled to record for want of the certificate aforesaid. (3) That where neither of two conveyances is recorded within five days from the time of execution as provided in section 26, Misc. Laws, the one thereafter first recorded will take precedence. (4) That under the recording acts of this State, a mortgage stands upon the same footing as an absolute conveyance. — *Fleschner v. Sumpter*, 161.



See FRAUDULENT CONVEYANCES.

DIVORCE.

1. DIVORCE. — A divorce will not be granted when it is apparent that the petitioner's principal object in seeking one is to secure certain property rights. — *Adams v. Adams*, 176.
2. DIVORCE — CUSTODY OF MINOR CHILDREN. — A decree of divorce which fails to provide for the care and custody of the minor children of the marriage, if there be such, is defective. — *Doon v. Boon*, 437.

3. **ID.—CRUEL TREATMENT—WHAT NECESSARY TO CONSTITUTE.**—The mere fact that a husband has been imprudent and unreasonable, or jealous, does not necessarily constitute a ground for divorce. It must appear that he has evinced a malignant desire to annoy and harass his wife. — *Id.*
4. **ID.**—The evidence reviewed, and held not to sustain a charge of cruel and inhuman treatment, rendering life burdensome. — *Id.*

EJECTMENT.

EJECTMENT—WIDOW.—Ejectment does not lie to enforce the right of a widow to remain in her husband's dwelling-house one year after his death, without liability for rent. — *Atken v. Atken*, 208.

EQUITY.

1. **EQUITABLE JURISDICTION.**—But when a court of equity originally had jurisdiction in any class of cases for which the proceeding at common law did not then afford an adequate remedy, such jurisdiction will not be lost by reason of subsequent legislation conferring on courts of law authority to decide such cases, unless there are negative words excluding the jurisdiction of equity. — *Phipps v. Kelly*, 218.
2. **ID.**—When a court of equity has taken jurisdiction for one purpose, it will generally retain the case until the whole subject is disposed of; but the primary and original object of the suit must in such case be clearly within its jurisdiction. — *Id.*
3. **EQUITY—AUXILIARY JURISDICTION.**—Equity will lend its aid to prevent an attempted fraud on creditors by means of an insolvent law, but not, ordinarily, until the legal remedies are exhausted. The jurisdiction is only auxiliary, except in certain cases where a fund has been set apart in some manner to the payment of a particular class of debts. — *Dawson v. Coffee*, 518.
4. **FRAUDULENT CONVEYANCES—SIMPLE CONTRACT CREDITORS.**—(Per WALDO, C J.).—Simple contract creditors alleging a simple indebtedness to them cannot maintain a suit to set aside a conveyance on the ground of fraud. They must first establish their claim at law, and exhaust the remedies afforded by a court of law for its collection. This is a condition precedent to the jurisdiction of equity. — *Id.*
5. **ASSIGNMENT LAW—CLAIM OF CREDITORS—EQUITY JURISDICTION.**—Where an insolvent has made an assignment for the benefit of all his creditors under the insolvent law of the State, and the claim of a creditor has been presented to the assignee and allowed under the provisions of the act, these facts would entitle the creditor to resort to equity to prevent a fraudulent division and misapplication of the fund. — *Id.*
6. **MERGER IN EQUITY.**—Where the owner in whom different estates have united has an interest in keeping them distinct, the intent to keep the estates separate will be implied or presumed, and there will be no merger. — *Watson v. Dundee Mortgage & Trust Investment Company*, 474.
7. **ID.—INTERVENING ESTATE.**—When an outstanding estate intervenes between the several interests uniting in the same person there cannot be a merger. — *Id.*

See CREDITORS' BILLS.

ESTATES OF DECEDENTS

EXECUTORS AND ADMINISTRATORS—CLAIM AGAINST ESTATE—OBJECTIONS TO, WHEN WAIVED.—Where the affidavit to a claim against the estate of decedent contains the substance of the statutory requirements, but the claim is irregular in form and is rejected by the administrator on that account, he should specify the nature of his objections. Otherwise he will be deemed to have waived them. — *Aiken v. Goodridge*, 244.

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See EXECUTORS AND ADMINISTRATORS.

ESTOPPEL.

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See RES JUDICATA.

EVIDENCE.

1. **EVIDENCE—NONSUIT.**—Where incompetent evidence is admitted without objection in the course of a trial, the court will treat it as competent on motion for nonsuit. — *Jacobson v. Siddal*, 280.
2. **EVIDENCE.**—It is ordinarily proper for courts at *nisi prius* to permit documents to be offered in evidence provisionally, and afterwards to instruct the jury as to their effect. — *Smith v. Shattuck*, 382.
3. **EVIDENCE—DECLARATIONS OF PARTY—RES GESTÆ.**—In an action for damages for injuries resulting from ejectment from a railroad train, the declarations of the plaintiff immediately after the event, in the absence of the defendant, narrating the occurrence, are not part of the *res gestæ*, and cannot be given in evidence. — *Sullivan v. Oregon Railway & Navigation Company*, 397.
4. **EVIDENCE—OWNERSHIP OF TRAIN.**—In an action for damages for injuries resulting from ejectment from a railroad train, it is incumbent on the plaintiff to prove, not who was the owner of the train, but who was using it at the time. — *Id.*
5. **DECLARATIONS OF PARTY AS TO PHYSICAL CONDITION.**—The declarations of a party are received to prove his physical condition and symptoms, whether arising from sickness or injury. — *State v. Mackey*, 154.
6. **EVIDENCE—ADMISSION.**—A printed notice signed by the superintendent of the company, offering a reward for the recovery of the goods, and which had been posted in conspicuous places, is competent evidence as an admission of liability on the part of the company. — *Bennett v. Northern Pacific Express Co.*, 49.
7. **EVIDENCE—VOID JUDICIAL RECORD.**—A record of a void judicial proceeding is admissible in evidence as a private writing and part of the *res gestæ*, to show the inducement to a deed made by the parties to cure the defect in such judicial proceedings. — *Stinson v. Porter*, 444.
8. **EVIDENCE—AMBIGUITY—PAROL PROOF.**—*Semble*, that between original parties, when an instrument is ambiguous or uncertain upon its face, and the matter is in doubt whether a principal or his agent is liable, such uncertainty may be removed by extraneous proof. — *Guthrie v. Imbrie*, 182.
9. **USURY—DEGREE OF PROOF.**—To establish the defense of usury requires clear and cogent proof. Vague inferences or mere probabilities or conjectures are not sufficient. — *Poppleton v. Nelson*, 349.

10. **EVIDENCE—IMPEACHING WITNESS—HOSTILE DECLARATIONS.**—There is no difference in principle between admitting declarations of hostility of a witness, for the purpose of affecting the value of his testimony, and admitting contradictory statements for the same purpose. — *State v. Mackey*, 154.
11. **REFEREE—ORAL EVIDENCE—DOCUMENTS.**—A referee to take testimony is appointed only to take oral proofs in the case. Written documents, especially when proved by being authenticated as provided by statute, may be put in evidence at the hearing. — *Baker v. Woodward*, 8.
12. **CRIMINAL LAW—EVIDENCE—PRESUMPTION—POSSESSION OF STOLEN PROPERTY.**—The only presumption of guilt arising from the possession of property recently stolen is one of fact and not of law. — *State v. Hale*, 352.

See WITNESSES.

EXECUTIONS.

EXEMPTION FROM EXECUTION—WEARING APPAREL.—A watch of moderate value may be exempt from execution as "necessary wearing apparel," when it is made to appear that the watch and other articles reserved as wearing apparel do not exceed the amount limited by the statute. But in such case it lies with the party claiming the exemption to prove affirmatively the facts which establish his claim. — *Stewart v. McChung*, 431.

EXECUTORS AND ADMINISTRATORS.

1. **ADMINISTRATION—JURISDICTION OF COUNTY COURTS OVER—VOID AND VOIDABLE ORDER.**—The county court has exclusive jurisdiction in the first instance to grant and revoke letters testamentary, and granting administration out of the order provided in section 1053 of the Code would be erroneous, but not a nullity. The persons entitled to precedence could only take advantage of the error by applying for the appointment within the time specified in said section; otherwise they waive their right. — *Ramp v. McDaniel*, 108.
2. **POWERS OF COUNTY COURT IN PROBATE MATTERS—RESIGNATION OF ADMINISTRATOR.**—The powers of the Probate Court are not created by the statute. They are enlarged, limited, or varied. It is not necessary that a resignation, to be valid, should be made in conformity with section 1079 of the Code, requiring notice of intention to resign to be published. Apart from said section it would seem an administrator may, with the consent of the court, resign. — *Id.*
3. **Id.—WHEN VOID AND WHEN VOIDABLE.**—(Per WALDO, C. J., concurring).—Administration is void when granted by a wrong ordinary, and voidable when granted to a wrong person. — *Id.*
4. **Id.—CONSTRUCTION OF STATUTE—EVIDENCE.**—The provision that the persons specified in subdivision 1 of section 1058 shall be deemed to have renounced their right to administration, unless they apply therefor within thirty days, is a rule of evidence rather than of positive law, and the court may appoint any of the persons specified in said subdivision after the thirty days, in preference to those specified in the subdivisions following. — *Id.*
5. **Id.—COLLATERAL ATTACK.**—An order appointing or removing an administrator cannot be attacked collaterally. — *Id.*
6. **Id.—PRESUMPTION.**—After verdict, when the contrary does not appear, it will be inferred that an administrator qualified immediately after letters issued to him. — *Aiken v. Coolidge*, 244.

7. EXECUTORS AND ADMINISTRATORS—CLAIM AGAINST ESTATE—OBJECTIONS TO, WHEN WAIVED.—Where the affidavit to a claim against the estate of decedent contains the substance of the statutory requirements, but the claim is irregular in form and is rejected by the administrator on that account, he should specify the nature of his objections. Otherwise he will be deemed to have waived them.—*Aiken v. Coolidge*, 214.

See ESTATES OF DECEDENTS.

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FERRIES.

1. FERRIES PART OF HIGHWAY—RIGHTS OF PUBLIC.—A ferry forms part of, and can only exist in connection with a public highway, or as a connecting link between places in which the public has rights, on paying the tolls prescribed by public authority.—*Hackett v. Wilson*, 25.
2. COUNTY COURTS—EXTENT OF JURISDICTION.—When the county court has exercised its authority by granting a license at the suggestion of the public convenience, and a ferry is established connecting such highway or places, it has exhausted its jurisdiction as to such highways or places while such franchise exists, and cannot license another ferry at substantially the same place.—*Id.*
3. JURISDICTION TO LICENSE FERRIES—TOLLS.—The primary object of our statute, conferring jurisdiction upon county courts to license ferries, is to secure the public accommodation; the right to take tolls is conferred as an equivalent for the obligation to accommodate the traveling public. Although the right to take tolls is *privati juris* and incident to the franchise, a ferry is *publici juris* and cannot be created without a license.—*Id.*
4. ASSIGNMENT OF LICENSE—CANNOT BE QUESTIONED COLLATERALLY.—Whether a ferry license is assignable or not, *quære*; but if it is a personal trust, not assignable without the consent of the granting power, the right to object to its transfer, or its exercise by a party other than the original licensee, is a right affecting the public, to be taken advantage of by its officers, and cannot be collaterally questioned.—*Id.*
5. FERRY LICENSE—ASSIGNABILITY.—Whether a ferry license is assignable without the consent of the granting power, *quære*.—*Hackett v. Mulnomah Railway Company*, 124.
6. CORPORATION—COTENANCY IN A FRANCHISE—ACCOUNTING.—A corporation may be a joint owner of a ferry where not inconsistent with its constitution, and as such, entitled to share in its earnings, and to that end may have an accounting.—*Id.*

FORCIBLE ENTRY AND DETAINER.

FORCIBLE ENTRY AND DETAINER—WIDOW.—Forcible entry and detainer does not lie to enforce the right of a widow to remain in her husband's dwelling-house one year after his death, without liability for rent.—*Aiken v. Aiken*, 203.

FORGERY.

1. **PROMISSORY NOTES—FORGERY.**—A note is not a forgery, but is genuine where signed by one party under the direction and authority of the persons represented to be the makers. — *State v. Lurch*, 95.
2. **CRIMINAL LAW—UTTERING FORGED WRITING—ADMISSION—SIMULATED HANDWRITING.**—Upon the trial of an indictment for uttering a forged writing, to wit, a promissory note, evidence that the name signed to the note had the appearance of being a different handwriting from the body of the instrument is proper, notwithstanding the accused admits that he signed the name, claiming to have had authority to do so. — *State v. Lurch*, 99.
3. **FORGERY—INTENT TO DEFRAUD SUFFICIENT—CONSTRUCTION OF STATUTE.**—To sustain a conviction upon a charge of forgery, under section 592 of the Criminal Code, the State must prove that the accused had made such a use of the forged instrument as might have resulted in injuring or defrauding some one. If the note has been "uttered or published as true and genuine," with *intent* to defraud, the offense is made out, though no defrauding be actually accomplished. — *Id.*
4. **Id.—EVIDENCE—SIMULATED HANDWRITING.**—Where the defendant admitted in his opening statement to the jury that he intentionally wrote the names alleged to have been forged as near like the parties would have written them as he could, evidence is nevertheless admissible to show that such names are in a different handwriting from the body of the instrument. — *State v. Lurch*, 104.
5. **CRIMINAL LAW—INDICTMENT—FORGERY.**—In an indictment for forgery it is not necessary to name any particular person in the indictment as having been defrauded. But the naming of such a person would have the effect to confine the proof of defrauding to the person named. — *Id.*

See CRIMINAL LAW.

FRANCHISES.

CORPORATIONS—COTENANCY IN A FRANCHISE—ACCOUNTING.—A corporation may be a joint owner of a ferry where not inconsistent with its constitution, and as such, entitled to share in its earnings, and to that end may have an accounting. — *Hackett v. Multnomah Railway Co.*, 124.

FRAUD.

PLEADING—FRAUDULENT REPRESENTATIONS.—In a defense upon the ground of fraudulent representations, it is not sufficient to aver that the representations were false, but the pleader must show wherein they were false. In such cases, facts, not conclusions, must be alleged. — *Specht v. Allen*, 117.

FRAUDULENT CONVEYANCES.

1. **CONVEYANCE—UNDUE INFLUENCE—CONSIDERATION—FRAUD.**—Inadequacy of consideration may be so gross that it shocks the conscience and furnishes satisfactory evidence of fraud. — *Aroher v. Lapp*, 196.
2. **Id.—FRAUDULENT REPRESENTATION.**—Obtaining the property of another under a form of purchase, without paying any consideration therefor, and with a design of acquiring it for nothing, is fraudulent in itself. Misrepresentation and deception in such a case will be implied. — *Id.*

3. FRAUDULENT CONVEYANCE—CREDITORS.—When a person who has contracted for the purchase of machinery conveys away his property before such machinery is delivered, his creditor may show that such conveyance was made with intent to defraud him. — *Crawford v. Beard*, 447.
4. EVIDENCE—ADMISSION NOT CONNECTED WITH TITLE OR POSSESSION.—In a suit to set aside a deed as in fraud of creditors, evidence of statements and admissions made by the grantor long after the execution of the deed, and unconnected with possession of the property, are immaterial. — *Id.*
5. *Id.*—FRAUDULENT INTENT—PRESUMPTION.—When the necessary result of a debtor's act is to place his property beyond the reach of legal process, it may be presumed that it was done with a fraudulent intent; but when the act is regular and fair upon its face the intent must be gathered from the surroundings. — *Id.*
6. *Id.*—SUBSEQUENT CREDITORS.—A subsequent creditor cannot attack such a conveyance except by showing that the grantor, at the time he made it, had in view the creation of such debt, and intended to defraud the creditor thereof. — *Id.*
7. *Id.*—VOIDABLE DEED MAY STAND FOR INDEMNITY.—A deed obtained under suspicious or inequitable circumstances, or which is only constructively fraudulent, may be permitted to stand as security for any purpose of reimbursement or indemnity. — *Id.*
8. FRAUDULENT CONVEYANCES—SIMPLE CONTRACT CREDITORS.—(Per WALDO, O. J.).—Simple contract creditors alleging a simple indebtedness to them cannot maintain a suit to set aside a conveyance on the ground of fraud. They must first establish their claim at law, and exhaust the remedies afforded by a court of law for its collection. This is a condition precedent to the jurisdiction of equity. — *Dawson v. Coffee*, 518.

GARNISHMENT.

See ATTACHMENT.

GUARANTY.

CONTRACT—CONSIDERATION—GUARANTY.—B. and S., copartners, being indebted to plaintiff, entered into a contract providing that "whereas, S. has this day sold and transferred to B." his interest in the partnership business, "and is to assume and pay all indebtedness of the firm of B. and S., and indemnify S. against said liabilities; therefore, we, B., R., and W., in consideration of the premises, hereby guaranty the performance of the conditions of said contract on behalf of said B., and undertake to indemnify said S. against said liabilities; held, that the undertaking of said guarantors B. and W. was valid and upon sufficient consideration. The promise to indemnify was as much a part of the consideration of the sale as the promise to pay the indebtedness, and until indemnity was furnished, the sale was incomplete. — *Hildebrand v. Bloodworth*, 75.

HIGHWAYS.

1. HIGHWAY—DEDICATION—USER.—The owner of the soil may make a qualified dedication of a road or way across it; he may reserve the right to keep a gate across it, or to subject it to any use not inconsistent with the public use. *Semble*, mere user, however long continued, is not sufficient to give a right to the public. — *Smith v. Gardner*, 221.

2. **ID.—PERMISSIVE USE.**—Permissive use of a way by certain portions of the community constitutes a license and not a dedication — *Id.*
3. **FERRIES PART OF HIGHWAY.—RIGHTS OF PUBLIC.**—A ferry forms part of, and can only exist in connection with a public highway, or as a connecting link between places in which the public has rights, on paying the tolls prescribed by public authority — *Hackett v. Wilson*, 25.
4. **INJUNCTION—HIGHWAY—OBSTRUCTION OF.**—An injunction to prevent the obstruction of an alleged street or highway will not be allowed, unless the right to the use of the street or highway as such is admitted or has been established at law, or is clear and easy of ascertainment. — *Watts v. Foster*, 247.
5. **CRIMINAL LAW—INDICTMENT—HIGHWAY.**—In an indictment for obstructing a highway, it is not necessary to set out the *termini*. It is sufficient to set out in a compendious way that it is a highway. *Altier* in pleading a private way. — *State v. Hume*, 133.
6. **ID.—TERMINI.**—If the *termini* be stated, they must ordinarily be proved. But when a local description, sufficient to fix the precise point of obstruction, is given as well as the *termini*, the latter may be disregarded on proof of a highway at the place of obstruction. — *Id.*

HOMICIDE.

CRIMINAL LAW—INDICTMENT—PLEA OF NOT GUILTY—CHARGE TO THE JURY.—The plea of not guilty puts in issue every material allegation in an indictment. An instruction that "the State has fully established" the fact of the killing, and that "the only material allegation about which there is any dispute is that which charges these defendants with having purposely and of deliberate and premeditated malice caused the death of," etc., is error. The killing of deceased by the defendants must be found by the jury before the question of premeditation or malice could arise. — *State v. Mackey*, 154.

HUSBAND AND WIFE.

1. **WIDOW—CONSTRUCTION OF STATUTE—FORCIBLE ENTRY AND DETAINER—EJECTMENT.**—Under section 23, chapter 17, of the Miscellaneous Laws, a widow is entitled to remain in the dwelling-house of her husband one year after his death without being chargeable with rent therefor. Said section has not been repealed or modified by section 1094 of the Civil Code. Such right applies only to lands of which the husband was owner, and not to a leasehold estate. But neither forcible entry nor ejectment lies to enforce such right. — *Aiken v. Aiken*, 203.
2. **FORCIBLE ENTRY AND DETAINER—WIDOW.**—Forcible entry and detainer does not lie to enforce the right of a widow to remain in her husband's dwelling-house one year after his death, without liability for rent. — *Id.*
3. **MARRIED WOMEN—POWER TO CONTRACT—FAMILY EXPENSE.**—The effect of the act regulating the rights and liabilities of married women (approved October 21, 1878) was to enable her to contract and incur liabilities, and such contracts and liabilities may be enforced the same as if she were unmarried. For family expenses she may be sued jointly with her husband, or separately, and a personal judgment rendered against her. — *Phipps v. Kelly*, 213.

INDEMNITY.

See GUARANTY.

action as would excuse him in a failure to exercise the same care and forethought that would ordinarily be required of a prudent man under similar circumstances, it is his duty to ask for an instruction appropriate to that theory of the cause. Failing to do so it is not error in the court to omit to charge the jury upon that theory. — *Hurst v. Burnside*, 520.

8. **DAMAGES — CONTRIBUTORY NEGLIGENCE — INSTRUCTION TO JURY.** — In an action for damages to an employee by reason of alleged defects in the machinery of a mill, it is not error to charge that "if the plaintiff knew the position, condition, and character of the machinery by which he was injured, and could reasonably have avoided the danger by approaching the same from the outward revolutions of the gear, and did not do so because he did not think or look, he was guilty of negligence precluding recovery. It was the duty of plaintiff when approaching machinery about which he was employed to both think and look, in order to avoid injury from such machinery, and if you find from the evidence that the injury sustained by plaintiff was received by reason of his failure to think or look as to what he was doing, he was guilty of such negligence as precludes recovery." — *Id.*
4. **EVIDENCE.** — It is ordinarily proper for courts *visi prius* to permit documents to be offered in evidence provisionally, and afterwards to instruct the jury as to their effect. — *Smith v. Shattuck*, 362.
5. **VERDICT — POWER OF COURT OVER.** — The court has no right to direct the jury to find a designated verdict. Its authority is limited to stating to them "all matters of law which it thought necessary for their information in giving their verdict." — *Id.*

INSURANCE.

1. **LIFE INSURANCE — FOREIGN CORPORATION — CONSTRUCTION OF STATUTE — DOING BUSINESS.** — Taking an application for life insurance by an agent in Washington Territory, and forwarding to the insurance company in Kansas, which alone had authority to accept or reject the application, and where it was accepted, and a policy issued thereon, is not "doing insurance business" in said Territory, within the meaning of the statute thereof; but subsequently taking a note for an installment of the premium on such policy when it became due, and transmitting it to the company in like manner, is doing business within the meaning of such statute. — *Haaheny v. Leary*, 40.

JUDGMENTS.

1. **JUDGMENTS — DEFAULT.** — A judgment by default is attended with the same legal consequences (by way of estoppel) as if there had been a verdict for the plaintiff. *Neil v. Tolman*, 289.
2. **JUDGMENT — ENTRY OF, BY CLERK, BY DEFAULT — (WALDO, C. J., dissenting).** — The statute authorizing the clerk to enter judgment by default or upon confession is not unconstitutional. — *Crauford v. Beard*, 447.
3. **CONVEYANCE UNRECORDED — JUDGMENT LIEN — PRIORITIES — NOTICE.** — A conveyance of real property in this State is void as against the lien of a judgment, unless such conveyance be recorded at the time of docketing such judgment, or within the time after its execution provided by law as between conveyances for the same real property; but such lien would not prevail over a prior unrecorded conveyance, unless it also appeared that the lien was taken or acquired in good faith, without knowledge or notice of such prior unrecorded conveyance. — *Baker v. Woodward*, 8.

4. PRACTICE—JUDGMENT NON-OBSTANTE—APPEAL.—When it is claimed that a pleading does not state a cause of action or defense, as the case may be, and such objection is not raised till the trial, the party so objecting should be compelled to resort to a motion for judgment, notwithstanding the verdict, in case one were rendered against him, as the party interposing the pleading ought, when it has not been demurred to, to be entitled to the presumptions such a verdict would afford; but where the pleading is so defective that no valid judgment could be rendered upon it, and judgment has gone against the party filing such pleading, this court will not reverse such judgment because a different course was adopted. — *Specht v. Allen*, 117.
5. JUDGMENT OF JUSTICE'S COURT—REVIVOR.—A Justice's Court cannot revive a judgment so as to make it a lien on real estate. — *Glaze v. Lewis*, 347.
6. JUDGMENT—REVIVOR—JURISDICTION.—The Circuit Court has jurisdiction to revive a judgment of a Justice's Court, of which a transcript has been docketed in the judgment docket of the Circuit Court, in accordance with section 53 of the Justice's Code. — *Id.*
7. FORMER JUDGMENT—RES JUDICATA.—A former judgment is final and conclusive between the parties, not only as to the matter actually determined, but as to every other matter which the parties might have litigated and had decided as incident to, or essentially connected with, the subject-matter of the original action, either as a matter of claim or defense. — *Neil v. Tolman*, 289.
8. WATER RIGHTS.—A former decree for want of answer having established the defendant's right to divert the waters of Bear Creek through the ditch in controversy, that right cannot be again litigated between the same parties. — *Id.*
9. DIVORCE—CUSTODY OF MINOR CHILDREN.—A decree of divorce which fails to provide for the care and custody of the minor children of the marriage, if there be such, is defective. — *Boon v. Boon*, 437.

JURISDICTION.

1. REMEDIES—LEGAL RIGHTS—JURISDICTION AT LAW.—When a right is of such a character that a court of law is authorized to take cognizance of it, and to afford a plain, adequate, and complete remedy, the general principle is that the plaintiff must enforce his right at law. — *Phipps v. Kelly*, 218.
2. EQUITABLE JURISDICTION.—But when a court of equity originally had jurisdiction in any class of cases for which the proceeding at common law did not then afford an adequate remedy, such jurisdiction will not be lost by reason of subsequent legislation conferring on courts of law authority to decide such cases, unless there are negative words excluding the jurisdiction of equity. — *Id.*
3. *Id.*—When a court of equity has taken jurisdiction for one purpose, it will generally retain the case until the whole subject is disposed of; but the primary and original object of the suit must in such case be clearly within its jurisdiction. — *Id.*
4. EQUITY—AUXILIARY JURISDICTION.—Equity will lend its aid to prevent an attempted fraud on creditors by means of an insolvent law, but not, ordinarily, until the legal remedies are exhausted. The jurisdiction is only auxiliary except in certain cases where a fund has been set apart in some manner to the payment of a particular class of debts. — *Dawson v. Coffee*, 513.
5. FRAUDULENT CONVEYANCES—SIMPLE CONTRACT CREDITORS.—(Per WALDO, C. J.).—Simple contract creditors alleging a simple indebtedness to them cannot maintain a suit to set aside a conveyance on the ground of fraud. They must first establish their claim at law, and exhaust the remedies afforded by a

- court of law for its collection. This is a condition precedent to the jurisdiction of equity. — *Id.*
6. **REMEDIES — PRACTICE.** — Under our system of jurisdiction all the common-law remedies are preserved in some form, and when the course of proceeding is not specifically pointed out, any suitable process may be adopted conformable to the spirit of the Code. — *Aiken v. Aiken*, 203.
 7. **CIRCUIT COURTS — JURISDICTION OF.** — Where the jurisdiction is not vested exclusively in some other court, all remedies for the enforcement of legal rights belong to the Circuit Court, which, when no mode of proceeding is pointed out, may adopt any most conformable to the spirit of the Code. — *Id.*
 8. **INSOLVENCY PROCEEDINGS — JURISDICTION IN.** — In the exercise of the supervisory control over assignees of insolvents conferred upon Circuit Courts by the Act of October 18, 1878, such courts exercise only a special statutory authority, and in the exercise thereof stand upon the same footing as courts of limited and inferior jurisdiction. — *In re Goldsmith*, 414.
 9. **JUDGMENT — REVIVOR — JURISDICTION.** — The Circuit Court has jurisdiction to revive a judgment of a Justice's Court, of which a transcript has been docketed in the judgment docket of the Circuit Court in accordance with section 53 of the Justice's Code. — *Glaze v. Lewis*, 347.
 10. **JUDGMENT OF JUSTICE'S COURT — REVIVOR.** — A Justice's Court cannot revive a judgment so as to make it a lien on real property. — *Id.*
 11. **JURISDICTION OF JUSTICE'S COURT.** — Justices' Courts have jurisdiction of actions of replevin where the value of the property and the damages claimed do not exceed \$250, and such jurisdiction does not depend upon where the cause of action arose, provided the plaintiff or defendant reside in the precinct where the action is commenced, or service be had upon the defendant within the county, or where the defendant does not reside in the State. — *Kirk v. Mallock*, 319.
 12. **JUSTICES OF THE PEACE — JURISDICTION.** — Justices of the peace have no jurisdiction in cases where title to real estate comes in question. — *Aiken v. Aiken*, 203.
 13. **ACTION FOR FORECLOSURE OF MORTGAGES — JURISDICTION OF CONTROVERSY BETWEEN DEFENDANTS.** — In a suit to foreclose a mortgage, the court has no authority to determine a controversy between defendants jointly liable on the note which the mortgage was given to secure, as to which of them was the principal debtor and which the surety. — *Hovenden v. Knott*, 267.
 14. **RECOVERY OF PERSONAL PROPERTY — AFFIDAVIT FOR — JURISDICTION.** — In an action for the recovery of personal property, the affidavit prescribed in section 181 of the Civil Code is the foundation of jurisdiction to order an immediate delivery of the property. — *Carlon v. Dixon*, 144.
 15. **JURISDICTION TO LICENSE FERRIES — TOLLS.** — The primary object of our statute conferring jurisdiction upon county courts to license ferries is to secure the public accommodation; the right to take tolls is conferred as an equivalent for the obligation to accommodate the traveling public. Although the right to take tolls is *privati juris* and incident to the franchise, a ferry is *publici juris* and cannot be created without a license. — *Hackett v. Wilson*, 25.
 16. **COUNTY COURTS — EXTENT OF JURISDICTION.** — When the county court has exercised its authority by granting a license at the suggestion of the public convenience, and a ferry is established connecting such highway or places, it has exhausted its jurisdiction as to such highways or places while such franchise exists, and cannot license another ferry at substantially the same place. — *Id.*

17. **ADMINISTRATION—JURISDICTION OF COUNTY COURTS OVER—VOID AND VOIDABLE ORDER.**—The county court has exclusive jurisdiction in the first instance to grant and revoke letters testamentary, and granting administration out of the order provided in section 1053 of the Code would be erroneous, but not a nullity. The persons entitled to precedence could only take advantage of the error by applying for the appointment within the time specified in said section; otherwise they waive their right. — *Ramp v. McDaniel*, 108.
18. **POWERS OF COUNTY COURT IN PROBATE MATTERS—RESIGNATION OF ADMINISTRATOR.**—The powers of the Probate Court are not created by the statute. They are enlarged, limited, or varied. It is not necessary that a resignation, to be valid, should be made in conformity with section 1079 of the Code, requiring notice of intention to resign to be published. Apart from said section it would seem an administrator may, with the consent of the court, resign. — *Id.*

JURY AND JURORS.

1. **GRAND JURY—CONSTITUTIONAL LAW—CONSTRUCTION OF STATUTE.**—The Constitution, article 7, section 18, having provided that the grand jury shall be chosen from the jurors in attendance at the court, an act which provides that the clerk shall draw from the body of jurors a grand jury several days prior to the term of court is in conflict therewith and void, and an indictment by a grand jury so drawn is invalid. — *State v. Lawrence*, 297.
2. **MOTION FOR NEW TRIAL—APPEAL FROM—MISCONDUCT OF JUROR.**—The ruling of the trial court on a motion for a new trial, on the grounds that a juror had drank intoxicating liquors during the trial, and that the evidence was insufficient to justify the verdict, cannot be reviewed on appeal. — *State v. Becker*, 318.
3. **VERDICT—POWER OF COURT OVER.**—The court has no right to direct the jury to find a designated verdict. Its authority is limited to stating to them "all matters of law which it thought necessary for their information in giving their verdict." — *Smith v. Shattuck*, 362.
4. **QUESTIONS OF FACT—VERDICT OF JURY—ERROR TO BE CLEARLY SHOWN.**—When the issue between the parties is mainly one of fact, the court ought not to disturb the finding of the jury unless it is clearly shown that error was committed at the trial. — *Hurst v. Burnside*, 520.

See QUESTIONS OF LAW AND FACT; VERDICT.

JUSTICES OF THE PEACE.

1. **JUSTICES OF THE PEACE—JURISDICTION.**—Justices of the peace have no jurisdiction in cases where title to real estate comes in question. — *Aiken v. Aiken*, 203.
2. **JUDGMENT OF JUSTICE'S COURT—REVIVOR.**—A Justice's Court cannot revive a judgment so as to make it a lien on real property. — *Glass v. Lewis*, 847.
3. **JURISDICTION OF JUSTICE'S COURT.**—Justices' Courts have jurisdiction of actions of replevin where the value of the property and the damages claimed do not exceed \$250, and such jurisdiction does not depend upon where the cause of action arose, provided the plaintiff or defendant reside in the precinct where the action is commenced, or service be had upon the defendant within the county, or where the defendant does not reside in the State. — *Kirk v. Mallock*, 819.

court of law for its collection. This is a condition precedent to of equity. — *Id.*

6. **REMEDIES — PRACTICE.** — Under our system of jurisdiction all remedies are preserved in some form, and when the courts not specifically pointed out, any suitable process may be ad to the spirit of the Code. — *Aiken v. Aiken*, 203.
7. **CIRCUIT COURTS — JURISDICTION OF.** — Where the jurisdiction sively in some other court, all remedies for the enforce belong to the Circuit Court, which, when no mode of proc may adopt any most conformable to the spirit of the Cod
8. **INSOLVENCY PROCEEDINGS — JURISDICTION IN.** — In the visory control over assignees of insolvents conferred up Act of October 18, 1878, such courts exercise only a sp and in the exercise thereof stand upon the same footin inferior jurisdiction. — *In re Goldsmith*, 414.
9. **JUDGMENT — REVIVOR — JURISDICTION.** — The Circuit revive a judgment of a Justice's Court, of which a t in the judgment docket of the Circuit Court in a the Justice's Code. — *Glaze v. Lewis*, 347.
10. **JUDGMENT OF JUSTICE'S COURT — REVIVOR.** — A J judgment so as to make it a lien on real property
11. **JURISDICTION OF JUSTICE'S COURT.** — Justice actions of replevin where the value of the pr do not exceed \$250, and such jurisdiction does of action arose, provided the plaintiff or def the action is commenced, or service be ha county, or where the defendant does not re- \$19.
12. **JUSTICES OF THE PEACE — JURISDICTION.** — diction in cases where title to real estate 203.
13. **ACTION FOR FORECLOSURE OF MORT BETWEEN DEFENDANTS.** — In a suit to authority to determine a controversy note which the mortgage was given t cipal debtor and which the surety. —
14. **RECOVERY OF PERSONAL PROPERTY.** — action for the recovery of person 181 of the Civil Code is the fou delivery of the property. — *Car*
15. **JURISDICTION TO LICENSE FERR** — conferring jurisdiction upon public accommodation; the r the obligation to accommoda tolls is *privati juris* and inc cannot be created without r
16. **COUNTY COURTS — EXTENT** — cised its authority by gr venience, and a ferry is exhausted its jurisdiction exists, and cannot lie *Id.*

WOMEN.

— **FAMILY EXPENSE.** — The effect of the law of married women (approved October 18, 1880) is that married women may make contracts and incur liabilities, and such contracts are as valid as if she were unmarried. For family expenses, she is liable jointly with her husband, or separately, and a person. — *Phipps v. Kelly*, 213.

— **FORCIBLE ENTRY AND DETAINER.** — EJECTMENT ACT, 17, of the Miscellaneous Laws, a widow is entitled to possession of her husband's house one year after his death. — *Id.* Therefor. Said section has not been repealed by the Civil Code. Such right applies only to lands, and not to a leasehold estate. But neither can it be enforced. — *Aiken v. Aiken*, 203.

AGE AND DIVORCE.

See DIVORCE.

MASTER AND SERVANT.

— **EMPLOYER'S LIABILITY.** — Exemplary damages cannot be recovered of a corporation for the wrongful acts of its servant, even when wilful and when the employer directed the doing of the act, or ratified it when the act was chargeable with gross negligence in the employment or when the servant was a servant. — *Sullivan v. Oregon Railway & Navigation Company*.

MECHANICS' LIENS.

— **CONSTRUCTION OF STATUTE.** — Under section 15 of the Act of 1880, providing for mechanics' liens, where there is no written contract, a lien attaches only in case the person erecting the building refuses to execute a memorandum in writing of the terms of the contract for its construction. — *Tatum v. Cherry*, 135.

— **LIEN FOR WORK.** — The lien law was not designed to give machinists and others a lien for work done on material furnished in the ordinary course of business. The person claiming a lien must be a contractor, must have either built or repaired a building in some definite particular. An entire transaction must have been completed by the parties at the outset. — *Id.*

MERGER.

— **MERGER IN EQUITY.** — Where the owner in whom different estates have united an interest in keeping them distinct, the intent to keep the estates separate will be implied or presumed, and there will be no merger. — *Watson v. Dundee Mortgage & Trust Investment Company*, 474.

— **INTERVENING ESTATE.** — When an outstanding estate intervenes between the several interests uniting in the same person there cannot be a merger. — *Id.*

LICENSE.

1. **WAYS—PERMISSIVE USE.**—Permissive use of a way by certain portions of the community constitutes a license and not a dedication.—*Smith v. Gardner*, 221.
2. **JURISDICTION TO LICENSE FERRIES—TOLLS.**—The primary object of our statute, conferring jurisdiction upon county courts to license ferries, is to secure the public accommodation; the right to take tolls is conferred as an equivalent for the obligation to accommodate the traveling public. Although the right to take tolls is *privati juris* and incident to the franchise, a ferry is *publici juris* and cannot be created without a license.—*Hackett v. Wilson*, 25.
3. **COUNTY COURTS—EXTENT OF JURISDICTION.**—When the county court has exercised its authority by granting a license at the suggestion of the public convenience, and a ferry is established connecting such highway or places, it has exhausted its jurisdiction as to such highways or places while such franchise exists, and cannot license another ferry at substantially the same place.—*Id.*
4. **FERRY LICENSE—ASSIGNABILITY.**—Whether a ferry license is assignable without the consent of the granting power, *quære*.—*Hackett v. Multnomah Railway Co.*, 124; *Hackett v. Wilson*, 25.
5. **ASSIGNMENT OF LICENSE—CANNOT BE QUESTIONED COLLATERALLY.**—Whether a ferry license is assignable or not, *quære*; but if it is a personal trust, not assignable without the consent of the granting power, the right to object to its transfer, or its exercise by a party other than the original licensee, is a right affecting the public, to be taken advantage of by its officers, and cannot be collaterally questioned.—*Hackett v. Wilson*, 25.

See **FERRIES**.

LIENS.

See **MECHANICS' LIENS**.

MALICIOUS PROSECUTION.

1. **MALICIOUS PROSECUTION—MALICE TO BE PROVEN.**—In an action for malicious prosecution, an instruction that "if the defendant acted rashly, wantonly, or wickedly, the presumption of malice is conclusive," is erroneous in making the question of malice an inference of law instead of a fact to be proved.—*Gee v. Culver*, 228.
2. **PROBABLE CAUSE—LAW AND FACT.**—The question of probable cause is a mixed question of law and fact.—*Id.*
3. **MALICIOUS PROSECUTION—DEFENSE.**—It is no defense to an action for malicious prosecution that the defendant laid the facts within his knowledge before a justice of the peace, and acted on his advice in making the arrests complained of.—*Id.*
4. **PLEADING—JUSTIFICATION.**—Under a simple denial in an action for malicious prosecution, a defendant can only give in evidence matter which directly controverts the allegations of the complaint. He cannot justify without alleging in his answer the facts constituting such justification. (Per TRAYER, J.)
Id.

MARRIED WOMEN.

1. **MARRIED WOMEN—POWER TO CONTRACT—FAMILY EXPENSE.**—The effect of the act regulating the rights and liabilities of married women (approved October 21, 1878) was to enable her to contract and incur liabilities, and such contracts and liabilities may be enforced the same as if she were unmarried. For family expenses she may be sued jointly with her husband, or separately, and a personal judgment rendered against her. — *Phipps v. Kelly*, 218.
2. **WIDOW—CONSTRUCTION OF STATUTE—FORCIBLE ENTRY AND DETAINER—EJECTMENT.**—Under section 23, chapter 17, of the Miscellaneous Laws, a widow is entitled to remain in the dwelling-house of her husband one year after his death without being chargeable with rent therefor. Said section has not been repealed or modified by section 1094 of the Civil Code. Such right applies only to lands of which the husband was owner, and not to a leasehold estate. But neither forcible entry nor ejectment lies to enforce such right. — *Aiken v. Aiken*, 208.

MARRIAGE AND DIVORCE.

See DIVORCE.

MASTER AND SERVANT.

EXEMPLARY DAMAGES.—Exemplary damages cannot be recovered of a corporation or other person for the wrongful acts of its servant, even when wilful and malicious, unless the employer directed the doing of the act, or ratified it when done, or unless it is chargeable with gross negligence in the employment or retention of such servant. — *Sullivan v. Oregon Railway & Navigation Company*, 392.

MECHANICS' LIENS.

1. **MECHANICS' LIENS—CONSTRUCTION OF STATUTE.**—Under section 15 of the Act of October 28, 1874, providing for mechanics' liens, where there is no written contract, the right to a lien attaches only in case the person erecting the building refuses to furnish a memorandum in writing of the terms of the contract for its construction. — *Tatum v. Cherry*, 135.
2. **ID.**—The lien law was not designed to give machinists and others a lien for work done and material furnished in the ordinary course of business. The person claiming a lien must be a contractor, must have either built or repaired a structure in some definite particular. An entire transaction must have been contemplated by the parties at the outset. — *Id.*

MERGER.

1. **MERGER IN EQUITY.**—Where the owner in whom different estates have united has an interest in keeping them distinct, the intent to keep the estates separate will be implied or presumed, and there will be no merger. — *Watson v. Dundee Mortgage & Trust Investment Company*, 474.
2. **ID.—INTERVENING ESTATE.**—When an outstanding estate intervenes between the several interests uniting in the same person there cannot be a merger. — *Id.*

MORTGAGES.

1. **CONTRACT — MORTGAGE.** — Contract construed, and held to constitute a mortgage. — *Manaudas v. Heilner*, 335.
2. **MORTGAGE — REGISTRATION OF.** — In this State a mortgage is only a security for a debt or the performance of the acts therein mentioned. But in form it is a conveyance, and as such within the intent of the registry act. — *Watson v. Dundee Mortgage and Trust Investment Company*, 474.
3. **ASSIGNMENT OF MORTGAGE — RECORDING OF, UNNECESSARY.** — (THAYER, J., dissenting). — A mortgage may be assigned without a formal conveyance. Such an assignment is not within the meaning of the registry act, and does not need to be recorded to protect the assignee against subsequent purchasers or encumbrancers. — *Id.*
4. **EQUITY — FORECLOSURE — DEFAULT — ASSIGNEE, WHEN BOUND BY — AGENT — TRUSTEE.** — R., the duly authorized agent of a foreign corporation, took a mortgage in his own name as "manager," and in fact as trustee for such company. In February, 1881, a prior mortgage on the same premises was foreclosed, R. being made a party and making default. In September, 1881, R., being still the agent of the corporation, brought suit in his own name as "manager" to foreclose the first-named mortgage so far as it affected other lands, recognizing in his bill the fact and the validity of the previous foreclosure. *Held*, that the corporation was bound by R.'s default in the first foreclosure suit, notwithstanding he had prior thereto formally assigned his said mortgage to said company. — *Id.*
5. **FORECLOSURE — INTEREST ACQUIRED BY PURCHASER.** — The purchaser at a foreclosure sale acquires the right of the mortgagee so far as he has any claim or interest in the premises for the security of his debt, and also so much of the equity of redemption as is not bound by the lien of a junior encumbrancer. — *Id.*
6. **FORECLOSURE OF MORTGAGE — CONTROVERSY BETWEEN DEFENDANTS.** — In a suit to foreclose a mortgage, the court has no authority to determine a controversy between defendants jointly liable on the note which the mortgage was given to secure, as to which of them was the principal debtor and which the surety. — *Hovenden v. Knott*, 267.

NEGLIGENCE.

1. **NEGLIGENCE.** — In every case the true test as to whether a party is chargeable with negligence is, whether the act was such that a man of ordinary prudence would have done it under all the circumstances. — *Hurst v. Burnside*, 520.
2. **DEFENSE — CONTRIBUTORY NEGLIGENCE.** — Contributory negligence is a defense, and must be averred as such. (*Walsh v. Or. Ry. & N. Co.* 10 Oreg. 250, distinguished.) — *Grant v. Baker*, 329.
3. **EXEMPLARY DAMAGES.** — Exemplary damages cannot be recovered of a corporation or other person for the wrongful acts of its servant, even when wilful and malicious, unless the employer directed the doing of the act, or ratified it when done, or unless it is chargeable with gross negligence in the employment or retention of such servant. — *Sullivan v. Oregon Railway & Navigation Company*, 392.
4. **DAMAGES — CONTRIBUTORY NEGLIGENCE — INSTRUCTION TO JURY.** — In an action for damages to an employee by reason of alleged defects in the machinery of a mill, it is not error to charge that "if the plaintiff knew the position, condition, and character of the machinery by which he was injured, and could reasonably have avoided the danger by approaching the same from the outward revolutions of the gear, and did not do so because he did not think or look, he was guilty of

negligence precluding recovery. It was the duty of plaintiff when approaching machinery about which he was employed to both think and look, in order to avoid injury from such machinery, and if you find from the evidence that the injury sustained by plaintiff was received by reason of his failure to think or look as to what he was doing, he was guilty of such negligence as precludes recovery." — *Hurst v. Burnside*, 520.

NEGOTIABLE INSTRUMENTS.

1. **BILL OF EXCHANGE — CONSIDERATION — FAILURE OF.** — Partial failure of consideration may be set up to an action on a bill of exchange, and the defendant may recoup his damages though they be unliquidated. — *Davis v. Wait*, 425.
2. **ID. — INDORSEE WITH NOTICE.** — The right of an indorsee of a bill of exchange with notice of failure of consideration cannot be superior to that of his indorser. — *Id.*
3. **ID. — CORPORATE SEAL — PROMISSORY NOTE.** — But where a promissory note is signed "A. B. Pres't," and "C. D. Sec. G. M. Co.," and on its face is plainly stamped an impression of a seal bearing the words "Granger Market Co.," it must be assumed that the seal was put there to serve some purpose. Such an instrument indicates an intention to bind the company and not the individuals. — *Guthrie v. Imbrie*, 182.
4. **ID. — EFFECT OF CORPORATE SEAL.** — (Per WALDO, C. J., dissenting). — The sole purpose of a corporate seal is to give full faith and credit to the writing to which it is appended. Where a promissory note is signed by the president and secretary of a corporation as such, without other words indicating that the note is the act of the corporation, affixing the seal cannot be construed into a declaration that they signed on behalf of the company. — *Id.*
5. **PROMISSORY NOTES — FORGERY.** — A note is not a forgery, but is genuine where signed by one party, under the direction and authority of the persons represented to be the makers. — *State v. Lurch*, 95.

NOTICE.

QUIT-CLAIM DEED — NOTICE. — The fact that a vendor holds only under a deed of quit-claim and release is sufficient notice to a vendee to put him upon inquiry as to the true state of the title. — *Baker v. Woodward*, 8.

See REGISTRATION.

OBTAINING MONEY BY FALSE PRETENSES.

CRIMINAL LAW — OBTAINING MONEY BY FALSE PRETENSES — EVIDENCE. — Upon trial of an indictment for obtaining money by false pretenses, where the charge is that the accused had obtained money by giving certain forged instruments, purporting to be promissory notes of third parties, as security, representing them to be genuine, the accused may give evidence that the signatures upon the notes were written by himself, under the direction and authority of the persons represented to be the makers. A note so signed is not a false writing, but genuine. — *State v. Lurch*, 95.

PARENT AND CHILD.

DIVORCE—CUSTODY OF MINOR CHILDREN.—A decree of divorce which fails to provide for the care and custody of the minor children of the marriage, if there be such, is defective. — *Boon v. Boon*, 481.

• PARTIES.

1. **CORPORATIONS—CREDITORS OF—LIABILITY OF STOCKHOLDER—EQUITY—PARTIES.**—In a suit by a creditor to enforce the individual liability of a stockholder for a debt of the corporation, it is not necessary that all the creditors of the corporation be joined, nor that all the stockholders be made defendants. — *Brundage v. Monumental Gold & Silver Mining Company*, 322.
2. **Id.**—In a suit to enforce the individual liability of a stockholder, if a defendant stockholder desires other stockholders to be made parties, he must bring them in at his own expense by an answer or other proper proceeding. — *Id.*
3. **Id.**—When the object of the suit is to wind up the affairs of an insolvent corporation, and it becomes necessary to ascertain the whole amount of the indebtedness, and to whom due, and who are liable to contribute upon unpaid stock subscriptions, such suit should be in the name and for the benefit of all the creditors, and against all the stockholders found within the jurisdiction. — *Id.*

PARTNERSHIP.

1. **CORPORATION—PARTNERSHIP—AGENCY.**—The principle which prevents a corporation from being a partner with another corporation, or a natural person, is that in a partnership the act of one partner binds the firm, while a corporation can only be bound by the acts of its officers. — *Hackett v. Multnomah Railway Company*, 124.
2. **CONTRACT—LIABILITY OF INCOMING PARTNER.**—Where K. agreed to deliver cattle to F. and R. at a future time, and the latter were to give their promissory note in payment upon such delivery, and before the time of delivery S. and M. became partners with F. and R. in the agreement, and in pursuance thereof the note was executed in the name of the partnership, S. and M. thereby became liable to K., although K. at the time he took the note did not know they were such partners. — *Id.*
3. **PARTNERSHIP.**—Where articles of partnership provide that in case of a sale of the partnership property at any time before the expiration of the partnership, the proceeds of the sale shall be divided equally between the partners, one of the partners cannot be deprived of right to such a distribution without his consent. — *Moore v. Knott*, 260.

PLEADING AND PRACTICE.

1. **ACTIONS AND SUITS.**—In this State, the distinction between actions at law and suits has not been abolished. — *Burrage v. Bonanza Gold & Quicksilver Mining Company*, 169.
2. **REMEDIES—PRACTICE.**—Under our system of jurisdiction all the common-law remedies are preserved in some form, and when the course of proceeding is not specifically pointed out, any suitable process may be adopted conformable to the spirit of the Code. — *Aiken v. Aiken*, 203.

3. **APPEARANCE—NOTICE OF.**—The formal notice of appearance in a judicial proceeding prescribed in section 520 is unnecessary, unless the right of the attorney to appear is challenged by the adverse party. — *Carter, Rice & Co. v. Koshland*, 492.
4. **COMPLAINT—CAUSE OF ACTION.**—A complaint which alleges that defendants employed G. and B. to perform services, for which they promised to pay said G. and B. \$1,000, that G. and B. for a valuable consideration assigned said claim to the plaintiff, does not state a cause of action, in failing to allege that such services were performed. — *Weiner v. Lee Shing*, 276.
5. **PLEADING—COMPLAINT.**—A complaint which alleges that D rented a store to the defendant at his request for ten days, for which defendant promised to pay plaintiff the reasonable value, and further alleging the reasonable value and non-payment, states a cause of action. — *Schneider v. White*, 503.
6. **PRACTICE—DEMURRER—RECORD OF A CAUSE.**—When a demurrer is overruled, and the party pleads over, the demurrer is abandoned, and ceases to be a part of the record. — *Wells v. Applegate*, 208.
7. **PLEADING—WAIVER OF DEFECT IN.**—A defective statement of facts in a pleading is waived by joining issue upon them. — *Davis v. Wait*, 425.
8. **PRACTICE—DEMURRER—AMENDMENT.**—When a new answer is filed the former answer is in effect withdrawn, and ceases to be a part of the record, and all motions and demurrers relating thereto accompany it. — *Wells v. Applegate*, 206.
9. **PLEADING—DENIAL—AFFIRMATIVE MATTER.**—The denial of an allegation need not be absolute nor in any particular form. Affirmative matter qualifying a denial, when it does not amount to a justification, need not be separately stated, but may be joined to the denial as an *absque hoc*. — *Gee v. Culver*, 228.
10. **ID.—COUNTER-CLAIM.**—A counter-claim to a suit must be one upon which a suit might be maintained by the defendant against the plaintiff. An unliquidated demand, triable before a jury, and bearing no relation to the subject of the suit, cannot be used as a set-off to a suit in equity. — *Burrage v. Bonanza Gold & Quicksilver Mining Company*, 169.
11. **ARGUMENT—LIMITING TIMES FOR.**—A statute providing that the whole time occupied in the argument of a cause shall not exceed two hours on either side, unless the court for special reasons shall otherwise permit, it is not error for the court against the will of a party to limit the argument to a shorter time. That statute is only a limitation upon the power of the court to extend the time for argument, unless for special reasons. — *Hurst v. Burnside*, 520.
12. **PRACTICE—NONSUIT.**—To authorize the court to nonsuit a plaintiff, there must be such a total failure of proof of a material allegation of the complaint as would require the court to set aside the verdict for want of evidence, if the jury were to find for the plaintiff. — *Grant v. Baker*, 329.
13. **EVIDENCE—NONSUIT.**—Where incompetent evidence is admitted without objection in the course of a trial, the court will treat it as competent on motion for nonsuit. — *Jacobson v. Siddal*, 280.
14. **DEFECTIVE PLEADING—WHEN AIDED BY VERDICT.**—The verdict does not supply any fact omitted from a pleading, but it establishes every reasonable inference that can be drawn therefrom. — *Weiner v. Lee Shing*, 276.
15. **PLEADING—DEFECT AFTER VERDICT.**—After verdict, a party who alleges the insufficiency of a pleading is required to point out such a defect as the verdict will not cure, either that it states a defective title or no title. — *Aiken v. Coolidge*, 244.
16. **ERROR—EXCEPTION.**—It is not error, simply, but error legally excepted to, that constitutes ground for reversal. — *Kearney v. Snodgrass*, 311.

PRINCIPAL AND AGENT.

1. **PRINCIPAL AND AGENT—CONTRACT—CORPORATION.**—When a person executing a contract merely adds to the signature of his name the word "sec.," "agent," "trustee," without disclosing the name of his principal, he is personally bound.—*Guthrie v. Imbrie*, 182.
2. **ID.—EVIDENCE—AMBIGUITY—PAROL PROOF.**—*Semble*, that between the original parties, when the instrument is ambiguous or uncertain upon its face, and the matter is in doubt whether the principal or agent is liable, such uncertainty may be removed by extraneous proof.—*Id.*
3. **ID.—PRINCIPAL AND AGENT.**—B. S., living in Missouri, appointed J. S., a relative residing in this State, her attorney in fact, to lease lands belonging to her in this State and collect the rents arising therefrom, and relied on him for information as to the condition and value of said lands. Subsequently, B. S. wrote J. S. desiring to sell her said lands, and asking him to make an offer for the land in controversy, and in reply he offered her \$8,000 therefor. Prior to the acceptance of such offer, a third person offered J. S. the same sum for a part only of said premises, the latter promising to transmit such offer to the owner, but failing to do so. In a suit to set aside the deed from B. S. to J. S. made upon the acceptance of the latter's proposition, *held*, that there was such a relation of trust and confidence between the vendor and vendee as required the latter to transmit such offer to the former before purchasing himself, and that, failing to do so, the deed to him should be set aside on repayment of the purchase money.—*Savage v. Savage*, 459.
4. **DELIVERY TO AGENT OR CARRIER.**—Where goods are consigned to an owner in care of an agent of the carrier, it seems that delivery to the agent will exonerate the carrier. But such rule stands upon the ground of a tacit understanding between the parties.—*Bennett v. Northern Pacific Express Co.*, 49.
5. **EQUITY—FORECLOSURE—DEFAULT—ASSIGNEE, WHEN BOUND BY—AGENT—TRUSTEE.**—R., the duly authorized agent of a foreign corporation, took a mortgage in his own name as "manager," and in fact as trustee for such company. In February, 1881, a prior mortgage on the same premises was foreclosed, R. being made a party and making default. In September, 1881, R., being still the agent of the corporation, brought suit in his own name as "manager," to foreclose the first-named mortgage so far as it affected other lands, recognizing in his bill the fact and the validity of the previous foreclosure. *Held*, that the corporation was bound by R.'s default in the first foreclosure suit, notwithstanding he had prior thereto formally assigned his said mortgage to said company.—*Watson v. Dundee Mortgage & Trust Investment Co.*, 474.

PROCESS.

1. **GARNISHMENT—NOTICE OF.**—The delivery to a garnishee of a copy of the writ of attachment, together with a notice to the effect that the officer thereby "attached all debts, property, money, rights, dues, and credits of every nature in his hands or under his control," is a valid garnishment, and sufficiently specifies the property attached.—*Carter, Rice & Co. v. Koshland*, 492.
2. **GARNISHEE—PROCESS—SERVICE—VOLUNTARY APPEARANCE.**—In garnishment proceedings the order provided for in sections 150 and 160 of the Code of Civil Procedure is process, and must be served on the garnishee personally. Service upon his attorney is insufficient. But when it appears that such garnishee voluntarily appeared in person and by attorney at the hearing upon such order, such appearance is equivalent to personal service.—*Id.*

PUBLIC LANDS.

STATUTE OF LIMITATIONS—CONSTRUCTION OF STATUTE—SUITS BETWEEN DONATION CLAIMANTS.—The limitation of five years within which to commence suit in the cases specified in section 378 of the Civil Code, was intended to apply only to controversies arising under section 501 between rival claimants to the same tract as patentees of the State or the United States. — *Baker v. Woodward*, 8.

QUESTIONS OF LAW AND FACT.

1. **MALICIOUS PROSECUTION—MALICE TO BE PROVEN.**—In an action for malicious prosecution, an instruction that "if the defendant acted rashly, wantonly, or wickedly, the presumption of malice is conclusive," is erroneous in making the question of malice an inference of law instead of a fact to be proved. — *Gee v. Culver*, 228.
2. **PROBABLE CAUSE—LAW AND FACT.**—The question of probable cause is a mixed question of law and fact. — *Id.*
3. **EXPRESS COMPANY—MODIFICATION OF CONTRACT A QUESTION FOR THE JURY.**—A package of money was delivered to the Northern Pacific Express Co. for transportation, addressed to the "Northern Pacific Express Company, Ainsworth, W. T." Subsequently the address was changed by inserting the word "agent" before the word "northern." The money was lost, and in an action therefor, *held*, that whether such change resulted from a modification of the contract of carriage was a question for the jury. — *Bennett v. Northern Pacific Express Co.*, 49.

RAILROADS.

1. **EVIDENCE—OWNERSHIP OF TRAIN.**—In an action for damages for injuries resulting from ejectment from a railroad train, it is incumbent on the plaintiff to prove, not who was the owner of the train, but who was using it at the time. — *Sullivan v. Oregon Railway & Navigation Company*, 392.
2. **EVIDENCE—DECLARATIONS OF PARTY—RES GESTÆ.**—In an action for damages for injuries resulting from ejectment from a railroad train, the declarations of the plaintiff immediately after the event, in the absence of the defendant, narrating the occurrence, are not part of the *res gestæ*, and cannot be given in evidence. — *Id.*

REALTY.

LEGAL TITLE—NOTICE—CONSIDERATION—PLEADING—BURDEN OF PROOF.—In a controversy between two persons, each claiming the legal title, the defendant may assail the plaintiff's title on the ground either of notice, or want of consideration. But in such case he must allege and prove the facts invalidating such title. — *McIntyre v. Kamm*, 253.

RECORDS.

NEQUE PRO TUNC ORDER.—*Semble*, that at any time when the rights of third parties have not intervened, a court may so amend its records as to make them conform to the truth. — *Carter, Rice & Co. v. Koshland*, 492.

RECORDER'S COURTS.

APPEAL — PRACTICE — Unless expressly conferred by statute, there is no right of appeal from the decisions of a recorder's court in adjudications upon city ordinances. — *City of Corvallis v. Stock*, 391.

RECOUPMENT.

BILL OF EXCHANGE — CONSIDERATION — FAILURE OF. — Partial failure of consideration may be set up to an action on a bill of exchange, and the defendant may recoup his damages though they be unliquidated. — *Davis v. Wait*, 425.

REFEREES.

REFEREE — ORAL EVIDENCE — DOCUMENTS. — A referee to take testimony is appointed only to take oral proofs in the case. Written documents, especially when proved by being authenticated as provided by statute, may be put in evidence at the hearing. — *Baker v. Woodward*, 3.

REGISTRATION.

- 1 **CONVEYANCE — ACKNOWLEDGMENT — REGISTRATION — PRIORITY.** — On the 17th day of April, 1881, the defendant S. executed and duly acknowledged in this State a mortgage to the plaintiff of the premises in controversy. On the 15th day of June following, in Idaho Territory, the wife of the grantor signed the same mortgage, and acknowledged it before a clerk of a District Court of said Territory, and at the same time and place the same parties executed a deed of said premises to the defendants H. and B., and acknowledged it before the same officer. Neither instrument was accompanied by a certificate from the proper officer that it was executed and acknowledged in accordance with the laws of said Territory. Both were filed for record at the same time. *Held*, (1) That the due acknowledgment of said mortgage by the husband, entitled it to record without regard to the mode of execution by the wife. (2) That said deed was not entitled to record for want of the certificate aforesaid. (3) That where neither of two conveyances is recorded within five days from the time of execution as provided in section 26, Misc. Laws, the one thereafter first recorded will take precedence. (4) That under the recording acts of this State, a mortgage stands upon the same footing as an absolute conveyance. — *Fleischer v. Sumpter*, 161.
- 2 **MORTGAGE — REGISTRATION OF.** — In this State a mortgage is only a security for a debt or the performance of the acts therein mentioned. But in form it is a conveyance, and as such within the intent of the registry act. — *Watson v. Dundee Mortgage & Trust Investment Company*, 474.
- 3 **ASSIGNMENT OF MORTGAGE — RECORDING OF, UNNECESSARY.** — (THAYER, J., dissenting). — A mortgage may be assigned without a formal conveyance. Such an assignment is not within the meaning of the registry act, and does not need to be recorded to protect the assignee against subsequent purchasers or encumbrancers. — *Id.*
- 4 **CONVEYANCE UNRECORDED — JUDGMENT LIEN — PRIORITIES — NOTICE.** — A conveyance of real property in this State is void as against the lien of a judgment, unless such conveyance be recorded at the time of docketing such judgment, or within the time after its execution provided by law as between conveyances for

the same real property; but such lien would not prevail over a prior unrecorded conveyance, unless it also appeared that the lien was taken or acquired in good faith, without knowledge or notice of such prior unrecorded conveyance. — *Baker v. Woodward*, 8.

See DEEDS, MORTGAGES.

REPLEVIN.

1. REPLEVIN — JURISDICTION OF JUSTICE'S COURT. — Justices' Courts have jurisdiction of actions of replevin where the value of the property and the damages claimed do not exceed \$250, and such jurisdiction does not depend upon where the cause of action arose, provided the plaintiff or defendant reside in the precinct where the action is commenced, or service be had upon the defendant within the county, or where the defendant does not reside in the State. — *Kirk v. Mallock*, 319.
2. RECOVERY OF PERSONAL PROPERTY — AFFIDAVIT FOR — JURISDICTION. — In an action for the recovery of personal property, the affidavit prescribed in section 131 of the Civil Code is the foundation of jurisdiction to order an immediate delivery of the property. — *Carlon v. Dixon*, 144.
3. ID. — JUSTICE'S COURT — REPLEVIN BOND — SURETIES, LIABILITY ON. — When an affidavit in replevin for the immediate delivery of property is sufficient in form and substance in an action in a Justice's Court, the fact that the direction to the sheriff indorsed thereon was signed by the plaintiff instead of by the justice will not exonerate the plaintiff's sureties from liability on their bond. — *Id.*
4. REPLEVIN — VERDICT. — Where in an action for the recovery of personal property the plaintiff fails to allege the place from which the property was taken, the defect is cured by verdict. — *Kirk v. Mallock*, 319.

RES JUDICATA.

1. FORMER JUDGMENT — RES JUDICATA. — A former judgment is final and conclusive between the parties, not only as to the matter actually determined, but as to every other matter which the parties might have litigated and had decided as incident to, or essentially connected with, the subject-matter of the original action, either as a matter of claim or defense. — *Neil v. Tolman*, 289.
2. WATER RIGHTS. — A former decree for want of answer having established the defendant's right to divert the waters of Bear Creek through the ditch in controversy, that right cannot be again litigated between the same parties. — *Id.*
3. JUDGMENTS — DEFAULT. — A judgment by default is attended with the same legal consequences (by way of estoppel) as if there had been a verdict for the plaintiff. — *Id.*

RIPIARIAN RIGHTS.

1. RIPIARIAN RIGHTS. — When a natural stream of water flows through the lands of different persons, each has the right to use it for the ordinary purposes of life — to drink it, use it for culinary purposes, and to water animals. — *Shook v. Colohan*, 239.
2. CONSTRUCTION OF COVENANT. — A covenant in a deed provided "that the said S. F. M. Co. shall be entitled to have the Santiam water which is introduced to

Salem by said W. W. M. Co., except the water right heretofore granted to the State of Oregon by contract, divided into two equal parts, and that one half of the same shall flow and be conducted by the race now in use to the premises herein granted to the party of the second part, and the other half thereof shall flow down in the natural channel of Mill Creek, or through such other channel as may be provided; said division of said Santiam water shall be made at or near the dam on the land claim of A. F. Waller and wife, where the race running to the oil mill is taken out of Mill Creek. . . . And it is further covenanted by and between the parties hereto, their successors and assigns, that the said S. F. M. Co. shall pay one sixth of the expense, or do one sixth of the labor, and furnish one sixth of the material necessary to maintain in full use and repair the head-race and gates on or near the Santiam River, now owned and used by W. W. M. Co. for introducing said Santiam water to Salem; also maintain the dam on said Waller's claim." . . . Held, that under said covenant, the dam on the Waller claim was to be maintained by the S. F. M. Co. at their own expense, and an injunction should not be granted against the construction of a dam at the point indicated by the S. F. M. Co., but a suit might be maintained to compel an equal division of the water. — *City of Salem Co. v. Salem Flouring Mills Co.*, 814.

2. **RIPARIAN RIGHTS.**—The rights of a shore-owner upon tide water or a navigable stream are not derived from the State, but are held in subordination to the rights of the public. — *Wilson v. Welch*, 358.
4. **RIPARIAN RIGHTS — RIGHT TO PURCHASE.**—The right given to shore-owners on tide water or a navigable stream by the act of October 28, 1872, was a mere option to purchase, and does not constitute an equitable title. — *Id.*
5. **TIDE LAND ACT.**—*Quere*, whether a shore-owner on tide water or a navigable stream, purchasing abutting tide lands under the Act of October 28, 1872, and amendments, gains any greater rights than he had before. — *Id.*

See TIDE LANDS.

SALES.

CONTRACT OF SALE — BREACH OF — MEASURE OF DAMAGES.—In an action for breach of contract for the sale of "all the timber" on a certain tract of land "suitable for piling or railroad ties," and giving the purchaser a right of way to said timber, the measure of damages is the difference between the contract price and the market value of the timber standing at the time the cause of action arose, and it was error to allow evidence to show the cost of constructing a road to such timber. When the injury resulting from such error can, from the record, be segregated from the amount of the verdict, and plaintiff will remit such sum, the judgment will be affirmed for the balance; otherwise a new trial will be ordered. — *Mackey v. Olssen*, 429.

SEALS

1. **CORPORATE SEAL — PROMISSORY NOTE.**—But where a promissory note is signed "A. B., Pres't," and "C. D., Sec. G. M. Co.," and on its face is plainly stamped an impression of a seal bearing the words "Granger Market Co.," it must be assumed that the seal was put there to serve some purpose. Such an instrument indicates an intention to bind the company and not the individuals. — *Guthrie v. Imbrie*, 182.

2. **EFFECT OF CORPORATE SEAL.**—(Per WALDO, C. J. dissenting).—The sole purpose of a corporate seal is to give full faith and credit to the writing to which it is appended. Where a promissory note is signed by the president and secretary of a corporation as such, without other words indicating that the note is the act of the corporation, affixing the seal cannot be construed into a declaration that they signed on behalf of the company.—*Id.*

SET-OFF.

See RECOUPMENT.

SLANDER.

1. **SLANDER—TIME.**—In an action of slander it is not necessary to prove that the slanderous words were spoken on the day alleged in the complaint. It is sufficient to prove that they were spoken at any time before the commencement of the action, and are not barred by the Statute of Limitations.—*Quigley v. McKee*, 22.
2. **ID.—ACTIONABLE WORDS.**—When the court can see, without the aid of a jury, that the actionable words must prove injurious, they will be actionable *per se*; and the plaintiff in such cases will be entitled to at least nominal damages.—*Id.*

SPECIFIC PERFORMANCE.

1. **EQUITY—PAROL AGREEMENT FOR SALE OF LANDS—SPECIFIC PERFORMANCE OF.**—To authorize equity to interfere and enforce specific performance of a parol agreement for the sale of land upon the ground of part performance, it must be clear, certain, definite, just, reasonable, and mutual in all its parts, containing all the elements of a binding obligation, except the written memorandum required by statute.—*Wagonblast v. Whitney*, 83.
2. **SPECIFIC PERFORMANCE—COVENANT AGAINST ENCUMBRANCES.**—Where in a contract for the sale of real estate the vendor agrees to covenant against encumbrances, specific performance will not be decreed in his favor until all encumbrances on the property shall have been removed, or at least reduced to the amount of the balance of the purchase price.—*Sanford v. Wheelan*, 301.

STARE DECISIS.

STARE DECISIS.—The decision of this court in *Sellers v. City of Corvallis*, 5 Oreg. 273, criticised, but followed upon the principle of *stare decisis*.—*City of Corvallis v. Stock*, 391.

STATUTE OF FRAUDS.

1. **EQUITY—PAROL AGREEMENT FOR SALE OF LANDS—SPECIFIC PERFORMANCE OF.**—To authorize equity to interfere and enforce specific performance of a parol agreement for the sale of land upon the ground of part performance, it must be clear, certain, definite, just, reasonable, and mutual in all its parts, containing all the elements of a binding obligation, except the written memorandum required by statute.—*Wagonblast v. Whitney*, 83.

2. **Id. — PROOF REQUIRED.** — To take such a parol agreement for the sale of land out of the statute of frauds, the evidence must show the quantity of the land, define its boundaries, and fix the consideration. — *Id.*
3. **Id. — ASSIGNEE.** — The rule as to certainty and precision in the terms of a parol agreement for the sale of land is enforced with more stringency against assignees and representatives than between the original parties. — *Id.*

STATUTE OF LIMITATIONS.

1. **STATUTE OF LIMITATIONS — CONSTRUCTION OF STATUTE — SUITS BETWEEN DONATION CLAIMANTS.** — The limitation of five years within which to commence suit in the cases specified in section 878 of the Civil Code, was intended to apply only to controversies arising under section 501 between rival claimants to the same tract as patentees of the State or the United States. — *Baker v. Woodward*, 8.
2. **TITLE — ADVERSE POSSESSION — STATUTE OF LIMITATIONS.** — Adverse possession of real estate for the period prescribed by the Statute of Limitations vests a perfect title in the possessor as against the former holder of the title and all the world, and he is entitled to all remedies which are incident to possession under written titles. — *Parker v. Metzger*, 409.
3. **STATUTE OF LIMITATIONS — COLOR OF TITLE — TAX DEED.** — Where a defendant claims title by virtue of the Statute of Limitations, and offers in evidence a tax deed to himself, such deed in connection with possession is competent, even if its description of the premises is imperfect, to show that the defendant was holding under color of title. — *Smith v. Shattuck*, 362.

STATUTES.

1. **CONSTITUTIONAL LAW.** — When a statute has been long recognized as binding, and important affairs of the community have been transacted in accordance with its provisions, it should not be disturbed unless it unequivocally conflicts with the organic law. — *Crawford v. Beard*, 447.
2. **CONSTRUCTION OF STATUTE — CONSTRUCTION OF ANOTHER STATE.** — The adoption by the legislature of this State of a statute of another State gives to the practice and decisions of the latter, made prior to the enactment of our statute, the weight of authority in its construction. — *Malntyre v. Kamm*, 253.

STOCKHOLDERS.

See CORPORATIONS.

SURETYSHIP.

JUSTICE'S COURT — REPLEVIN BOND — SURETIES, LIABILITY ON. — When an affidavit in replevin for the immediate delivery of property is sufficient in form and substance in an action in a Justice's Court, the fact that the direction to the sheriff indorsed thereon was signed by the plaintiff instead of by the justice will not exonerate the plaintiff's sureties from liability on their bond. — *Carlson v. Dixon*, 143.

TAXATION.

1. **ILLEGAL TAX—PAYMENT UNDER PROTEST.**—One who is compelled to pay an illegal tax may pay the same under protest and recover it back by a proper proceeding. — *Brown v. School District No. 1*, 845.
2. **ILLEGAL TAX—INJUNCTION.**—Where the legality of a tax is disputed as to a part only, it is the duty of a plaintiff before bringing a suit to enjoin the correction of the disputed portion to pay or tender the part admitted to be valid. Otherwise his complaint will be dismissed. — *Id.*

TAX TITLES.

STATUTE OF LIMITATIONS—COLOR OF TITLE—TAX DEED.—Where a defendant claims title by virtue of the Statute of Limitations, and offers in evidence a tax deed to himself, such deed in connection with possession is competent, even if its description of the premises is imperfect, to show that the defendant was holding under color of title. — *Smith v. Shattuck*, 362.

TENANTS IN COMMON.

See COTENANCY.

TIDE LANDS.

1. **TIDE LANDS.**—The term "tide lands" applies to lands covered and uncovered by the ordinary tides, which the State owns by virtue of its sovereignty, and corresponds with the shore or beach, which at common law is that land lying between ordinary high and low water mark. — *Andrus v. Knott*, 501.
2. **Id.**—Tide land must be such land as is alternately covered and left dry by the ordinary flux and reflux of the tides. — *Id.*
3. **Id.**—**NAVIGABLE WATERS.**—Lands adjacent to navigable waters, where the tide flows and reflows, come within the description of tide lands, but it cannot be said to apply to lands which are covered with water three fourths of the year. — *Id.*
4. **RIPARIAN RIGHTS.**—The rights of a shore-owner upon tide water or a navigable stream are not divided from the State, but are held in subordination to the rights of the public. — *Wilson v. Welch*, 353.
5. **RIPARIAN RIGHTS—RIGHT TO PURCHASE.**—The right given to shore-owners on tide water or a navigable stream by the act of October 28, 1872, was a mere option to purchase, and does not constitute an equitable title. — *Id.*
6. **TIDE LAND ACT.**—*Quere*, whether a shore-owner on tide water or a navigable stream, purchasing abutting tide lands under the Act of October 28, 1872, and amendments, gains any greater rights than he had before. — *Id.*

TIME.

SLANDER—TIME.—In an action of slander it is not necessary to prove that the slanderous words were spoken on the day alleged in the complaint. It is sufficient to prove that they were spoken at any time before the commencement of the action, and are not barred by the Statute of Limitations. — *Quigley v. McKee*, 22.

TRESPASS.

INJUNCTION—TRESPASS—REMEDY AT LAW.—An injunction will be granted to restrain a trespass only when the facts show that the injury would be irreparable, and the remedy at law inadequate to redress the wrong or injury complained of. In all ordinary cases the party must resort to a court of law. — *Smith v. Gardner*, 221.

TROVER.

TROVER—CONVERSION OF SHARES OF STOCK.—Trover will lie for the conversion of shares of the capital stock of a corporation. — *Budd v. Multnomah Railway Co.*, 271.

TRUSTS AND TRUSTEES.

VENDOR AND VENDEE—FIDUCIARY RELATION.—Ordinarily, when there is no fiduciary relation between the parties, and no confidence is reposed by the vendor as to the particular contract, no duty rests on the vendee to disclose facts he may happen to know advantageous to the vendor. — *Savage v. Savage*, 459.

UNDERTAKINGS.

1. **APPEAL—PRACTICE—UNDERTAKING.**—Where an undertaking on appeal is filed before the notice of appeal is served, the appeal may be dismissed on motion. But when it appears that such undertaking was so filed in consequence of an excusable mistake, a cross-motion for leave to file an amended undertaking may be allowed upon proper terms. — *Hawthorne v. East Portland*, 210.
2. **JUSTICE'S COURT—REPLEVIN BOND—SURETIES, LIABILITY ON.**—When an affidavit in replevin for the immediate delivery of property is sufficient in form and substance in an action in a Justice's Court, the fact that the direction to the sheriff indorsed thereon was signed by the plaintiff instead of by the justice will not exonerate the plaintiff's sureties from liability on their bond. — *Carlton v. Dixon*, 144.

USURY.

USURY—DEGREE OF PROOF.—To establish the defense of usury requires clear and cogent proof. Vague inferences or mere probabilities or conjectures are not sufficient. — *Poppleton v. Nelson*, 849.

VENDOR AND VENDEE.

1. **VENDOR AND VENDEE—FIDUCIARY RELATION.**—Ordinarily, when there is no fiduciary relation between the parties, and no confidence is reposed by the vendor as to the particular contract, no duty rests on the vendee to disclose facts he may happen to know advantageous to the vendor. — *Savage v. Savage*, 459.
2. **QUIT-CLAIM DEED—NOTICE.**—The fact that a vendor holds only under a deed of quit-claim and release is sufficient notice to a vendee to put him upon inquiry as to the true state of the title. — *Baker v. Woodward*, 3.
3. **VENDOR AND VENDEE—CONTRACT OF SALE—DESTRUCTION OF PROPERTY.**—In every contract for the conveyance of property there is an implied condition that the subject-matter of the contract shall be in existence when the time for per-

formance arrives. If it has then ceased to exist, each party is discharged from the contract. — *Pouell v. Dayton, Sheridan & Grande Ronde R. R. Co.*, 488.

4. **EQUITY—PAROL AGREEMENT FOR SALE OF LANDS—SPECIFIC PERFORMANCE OF.**—To authorize equity to interfere and enforce specific performance of a parol agreement for the sale of land upon the ground of part performance, it must be clear, certain, definite, just, reasonable, and mutual in all its parts, containing all the elements of a binding obligation, except the written memorandum required by statute. — *Wagonblast v. Whitney*, 83.
5. **SPECIFIC PERFORMANCE—COVENANT AGAINST ENCUMBRANCES.**—Where in a contract for the sale of real estate the vendor agrees to covenant against encumbrances, specific performance will not be decreed in his favor until all encumbrances on the property shall have been removed, or at least reduced to the amount of the balance of the purchase price. — *Sanford v. Wheelan*, 301.
6. **VENDOR AND VENDEE—PRINCIPAL AND AGENT.**—B. S., living in Missouri, appointed J. S., a relative residing in this State, her attorney in fact, to lease lands belonging to her in this State and collect the rents arising therefrom, and relied on him for information as to the condition and value of said lands. Subsequently, B. S. wrote J. S. desiring to sell her said lands, and asking him to make an offer for the land in controversy, and in reply he offered her \$6,000 therefor. Prior to the acceptance of such offer, a third person offered J. S. the same sum for a part only of said premises, the latter promising to transmit such offer to the owner, but failing to do so. In a suit to set aside the deed from B. S. to J. S., made upon the acceptance of the latter's proposition, *held*, that there was such a relation of trust and confidence between the vendor and vendee as required the latter to transmit such offer to the former before purchasing himself, and that, failing to do so, the deed to him should be set aside on repayment of the purchase money. — *Savage v. Savage*, 459.

VERDICT.

1. **VERDICT—POWER OF COURT OVER.**—The court has no right to direct the jury to find a designated verdict. Its authority is limited to stating to them "all matters of law which it thought necessary for their information in giving their verdict." — *Smith v. Shattuck*, 362.
2. **REPLEVIN—VERDICT.**—Where in an action for the recovery of personal property the plaintiff fails to allege the place from which the property was taken, the defect is cured by verdict. — *Kirk v. Mallock*, 319.
3. **DEFECTIVE PLEADING—WHEN AIDED BY VERDICT.**—The verdict does not supply any fact omitted from a pleading, but it establishes every reasonable inference that can be drawn therefrom. — *Weiner v. Lee Shing*, 276.
4. **PLEADING—DEFECT AFTER VERDICT.**—After verdict, a party who alleges the insufficiency of a pleading is required to point out such a defect as the verdict will not cure, either that it states a defective title or no title. — *Aiken v. Coolidge*, 244.
5. **QUESTIONS OF FACT—VERDICT OF JURY—ERROR TO BE CLEARLY SHOWN.**—When the issue between the parties is mainly one of fact, the court ought not to disturb the finding of the jury, unless it is clearly shown that error was committed at the trial. — *Hurst v. Burnside*, 520.

WAREHOUSEMEN.

1. **WAREHOUSEMAN—WAREHOUSE RECEIPT—ASSIGNMENT—EFFECT OF.**—When by a warehouse receipt it is agreed to deliver the property to anyone to whom the

receipt may be indorsed as to one or *his order*, a symbolical delivery of the property may be effected by transfer of the receipt, and the warehouseman in such case becomes bailee to such transferee. — *Gill & Co. v. Frank*, 507.

2. *Id.* — But when a warehouseman by his receipt restricts his undertaking to delivery of the property to his bailor personally, a change in the possession of such property, so that his custody would become the possession of a stranger, cannot be effected without his consent. (*Solomon v. Bushnell*, 11 Oreg. 227, distinguished.) — *Id.*

WASTE.

INJUNCTION — WASTE. — A suit will lie for an injunction to stay waste, threatened or being committed. — *Sheridan v. McMullen*, 150.

WATER COURSES.

RIPARIAN RIGHTS. — When a natural stream of water flows through the lands of different persons, each has the right to use it for the ordinary purposes of life — to drink it, use it for culinary purposes, and to water animals. — *Shook v. Colohan*, 239.

WATERS.

See **RIPARIAN RIGHTS; TIDE LANDS.**

WAYS.

1. **WAYS — DEDICATION — USER.** — The owner of the soil may make a qualified dedication of a road or way across it; he may reserve the right to keep a gate across it, or to subject it to any use not inconsistent with the public use. *Semble*, mere user, however long continued, is not sufficient to give a right to the public. — *Smith v. Gardner*, 221.
2. *Id.* — **PERMISSIVE USE.** — Permissive use of a way by certain portions of the community constitutes a license and not a dedication. — *Id.*

See **HIGHWAYS.**

WITNESSES.

1. **INTIMIDATION OF WITNESSES — REMEDY — APPEAL.** — The intimidation of a party's witnesses, by the occurrence of a casual broil in a Justice's Court during the trial, does not justify him in withdrawing from the trial and afterward commencing a suit to impeach the judgment in such action. He has an adequate remedy by appeal to the Circuit Court. — *Scoggin v. Hall*, 372.
2. **EVIDENCE — IMPEACHING WITNESS — HOSTILE DECLARATIONS.** — There is no difference in principle between admitting declarations of hostility of a witness, for the purpose of affecting the value of his testimony, and admitting contradictory statements for the same purpose. — *State v. Mackey*, 154.
3. **EVIDENCE — CROSS-EXAMINATION — CONTRADICTORY STATEMENTS.** — The rule that when a witness has made statements different from those testified to by him on the trial his attention may be called to them, and if he deny having made them, witnesses may be called to prove that he did make them, applied. — *State v. Lurch*, 104.

4. EVIDENCE — RECALLING WITNESS. — After a witness has testified that he did not sign the note in question, he cannot be recalled to write his name for comparison with the signature to the note. — *State v. Lurch*, 99.
5. ID. — CONSTRUCTION OF STATUTE — EVIDENCE OF ACCUSED — CROSS-EXAMINATION OF. — The statute of this State, which allows a person accused of a crime to be a witness in his own behalf (Laws 1880, p. 28), strictly confines the right to cross-examine him to the facts testified to in chief; and it was error to require the defendant on cross-examination to write his own name, or that of another person, when he had not testified in reference thereto in his direct examination. — *Id.*
6. WITNESS — INTEREST — VALUE OF TESTIMONY. — Whether or not a witness attended the trial in obedience to a subpoena, or whether his fees were tendered him or what distance he traveled to attend, are questions of no importance in determining the value of his testimony; and the jury would not be justified in drawing any inference therefrom, *aliter*, perhaps, as to whether he attended voluntarily. — *Hurst v. Burnside*, 520.

WRIT OF REVIEW.

COUNTY COURTS — AUDITING ACCOUNT — WRIT OF REVIEW. — The county court, in auditing an account of services, where the amount of compensation is not fixed by law, is doing "county business"; its acts are judicial, and its award must be regarded as just compensation. In such case its decision may be reviewed by writ of review. — *Pruden v. Grant County*, 808.

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